

# 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 Graduate School of Education and Counseling, the Western States Center, the Pride Foundation, and Basic Rights Oregon



Native American  
Program • Legal Aid  
Services of Oregon

Lewis & Clark  
Graduate School of  
Education and Counseling



Pride  
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A COLLABORATION OF THE NATIVE AMERICAN PROGRAM OF LEGAL AID SERVICES OF OREGON,  
THE INDIGENOUS WAYS OF KNOWING PROGRAM AT LEWIS & CLARK COLLEGE, BASIC RIGHTS  
OREGON, AND THE WESTERN STATES CENTER

PRINTING AND DISTRIBUTION MADE POSSIBLE BY GENEROUS GRANTS FROM  
THE PRIDE FOUNDATION AND WESTERN STATES CENTER



## 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: We express our gratitude to our partners, allies and collaborators, specifically:

The Confederated Tribes of Siletz Indians, for their intention and action in operationalizing Two Spirit & LGBT equity work on behalf of their Tribal Citizens.

The Native American Program of Legal Aid Services of Oregon, specifically, Jennifer Amriott, for her time, dedication, thorough 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 LeaAnn Easton, for her mentorship and critical eye.

The Basic Rights Oregon Legal Advisory Group, for much appreciated attention to detail, current framing of these issues and how they relate to the lived experience of our LGBT community, specifically to Kodey Park Bambino, Shauna Ballo and Jeana Frazzini.

The Western States Center, for their investment, constant support, advice, guidance and encouragement of our team—for your willingness to and encouragement of us to strike out and dream big, specifically to Walidah, Imarisha, Aimee Santos-Lyons, Kalpana Krishnamurthy and Kelley Weigel.

The Pride Foundation & Western States Center for funding our inaugural print run and distribution.

To Matsya Siosal for her design skills & James Parker for layout and editing advice.

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.

## FORWARD

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Dear Relatives:

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 poisoning influences injected among us, and our children taken from our homes and placed in institutions of assimilation – in an attempt to conquer and control us, and to make us more like those who thought they had control of us. We have had to survive dehumanizing federal policies that treated us as misbehaving children, as if we were unable to live responsibly or make decisions for ourselves, as if we did not have the right to be treated as equals, as fully human.

Our Tribal societies have been damaged by this onslaught of policies, forced change, and the unspeakable losses and 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 ever dared to hope. Today we are reclaiming and reincorporating those parts of ourselves that it was the goal of federal polices to alienate. Our sense of natural law, and the blessings of our creator’s gifts, is restored in the present generations, 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 traditionally 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” expresses the concept of balance within an individual.

Since the time of contact with Europeans, our Two Spirit people and our societal beliefs surrounding Two Spirit roles and contributions to our communities have been marginalized and stigmatized, resulting in marginalized individuals and groups of people within our families and tribal communities. This has lead to perceptions that unprovoked violence against these unsupported persons is permitted, other times it leads to our unsupported members hurting themselves, whether with one (perhaps final) act; or many, which slice away at the chances of a productive life. When one of our members is oppressed & wrongfully mistreated, we are all made smaller, whether it is through active support for the action, or through neglectful silence, we can all be guilty of contributing to the result.

Many Two Spirit individuals are well known members of our own and other Tribal communities who have been exemplary carriers of culture, strong political and ceremonial leaders, amazing artisans, perhaps model citizens... perhaps showed human imperfections at times, but who love or loved their people, are, or were, loved by their people. Known to be kind, fair and strong in their beliefs, generously willing to help, and fierce in the defense of their communities... and yet

there is the too often unspoken or whispered truth – sometimes out of shame, sometimes out of awkwardness of the speaker, but it all amounts to the same thing – an implied lowering of status as a good and honest human being - by being silent or quiet in acknowledging that this beloved person is Two Spirit.

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 meaning and principles behind the traditional terms and the roles Two Spirits played and still play in our communities. For our Two Spirit Youth, it is an essential lifeline – giving them a healthy sense of purpose and role to fill, to feel [a part] of their community instead of feeling [apart], alone and without purpose or value.

We need to decide if we want our families and communities to be healthy and whole, if we want to be fair and just in our treatment of all our members, whether we all have the ability to live up to the fullest potential that we were born with and are able to develop throughout our lives. This toolkit provides us with an opportunity to reflect on how we, as Tribal Leaders, and Tribal Communities, are either passively or actively perpetuating policies, ordinances, or other bodies of Tribal Law that are damaging to the fabric of our Nations – or whether we are already committed to equity and justice for all members. 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 except 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, and help them live long, healthy, and productive lives. Do all you can to see that all of our Tribal people can walk this land without fear, exclusion, or mistreatment, and reach their fullest potential in life. It's a human right.

Respectfully,

Robert Kentta  
Siletz Tribal Member,  
Cultural Resources Director, and  
Tribal Council Member,  
Gitauk-uahi (Two Spirit)

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## CHAPTER 1: INTRODUCTION

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Within Tribal communities, family is important, and within most Native families, we know someone who is Two Spirit, lesbian, gay, bisexual, or transgender (collectively referred to herein as “Two Spirit / LGBT”). Too often, rejection of Two Spirit / LGBT community members by families, peers, and the community breaks families apart, and leads to harmful behaviors that damage and destroy individuals in our community. However, by accepting our Two Spirit / LGBT family members, we strengthen *all* families in our community.

Native Two Spirit / LGBT individuals face amongst the highest disparities across all social and health indicators. These disparities lead to cumulative outcomes that affect every area of life. For example:

- 19.1% of Native American gay male couples live in poverty (as opposed to 2.7% of white gay men). Overall, one out of every five children of gay and lesbian couples is poor, compared to one out of every ten children of married same sex couples. *However, nearly 41% of children being raised by Native American same sex male couples live in poverty.*<sup>1</sup>
- 20% of Native American transgender people live in extreme poverty, and they are more likely to be HIV positive.<sup>2</sup>
- While Native Americans have the highest suicide rate of any population in the United States, 56% of Native Trans respondents in a national transgender survey had attempted suicide.<sup>3</sup>
- More than half of Native American gay or lesbian students experience physical violence at school because of their sexual orientation.<sup>4</sup>

These disparities do not need to be permanent: there are many ways for tribal governments to exercise their sovereignty to address the structural barriers that many Two Spirit / LGBT Native people face. For example, tribal governments can develop codes and policies that promote equality and include and reflect the experiences of Two Spirit / LGBT tribal members. By making simple adjustments to laws and policies—like creating an inclusive definition of family, or extending hate and bias motivated criminal laws to cover crimes based on sexual orientation and gender identity—tribal governments can better protect all of their tribal citizens.

This Toolkit has been developed to give tribal legislators a brief overview of legal and policy issues that impact the equal treatment of Two Spirit / LGBT individuals. The Toolkit identifies areas in which existing laws discriminate against Two Spirit / LGBT individuals, and offers sample resolution and code language for tribal lawmakers to consider adopting to maximize equality within their communities.

## ABOUT THIS TOOLKIT

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The Toolkit is designed as a resource for tribal lawmakers and the committees, staff, and community members who assist them in drafting and enacting tribal laws. The draft code provisions provided in this Toolkit are intended to assist tribes as they amend their own existing laws. It may therefore be helpful to work through this Toolkit with the tribe's current laws in hand. In most cases, the sample code language is based on provisions from numerous sources. The tribal, federal, state, and international laws referenced during the development of this Toolkit are provided in the footnotes. If a tribe does not currently have laws governing the topics addressed in this Toolkit, the referenced laws may provide additional sample language. Commentary to the draft language is also provided to discuss some of the policy issues that should be considered when developing or revising tribal laws to promote Two Spirit / LGBT justice.

This Toolkit is not a replacement for Two Spirit / LGBT equality training. Special training for tribal decision-makers on issues impacting Two Spirit / LGBT justice is also essential. In addition, this Toolkit is not intended to provide "model" language. Instead, the sample language in this Toolkit 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. The sample provisions provided in this Toolkit should therefore be tailored to meet the specific requirements of the given tribal sovereign. Moreover, because there are advantages and disadvantages to adopting each sample provision, the sample language should not be adopted without thorough analysis by the appropriate tribal bodies and their legal counsel.

It is also important to note that implementation of the suggestions in this Toolkit will look differently within each tribal community. For some tribes, where there already exists leadership buy-in and there is collective agreement on the way forward, adoption of resolutions and codes to support Two Spirit / LGBT equality may seem easy and perfunctory. For other communities, where there has never been this conversation, engaging the community, building multiple ways to get their input, and de-colonizing gender constructs are an essential part of the work that needs to be done.

Although we have attempted to identify a wide range of tribal laws that could be enhanced to further justice for Two Spirit / LGBT individuals, this Toolkit is a first draft—and a work in progress. We recognize that this Toolkit does not cover many important Two Spirit / LGBT issues, including in the areas of corrections, gender affirming health care, changing documents, assisted reproductive technology, de facto parenting, jury service, adult foster care, and policies for promoting equality, which we plan to address in our next edition. 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.

It should also be understood that transforming culture is complex work. Values, practices and rules, having been passed on for generations and by multitudes of people and institutions, are embedded in our daily lives and become resistant to change. As such, policies that perpetuate oppression – including homophobia – seem invisible and unremarkable because of how deeply they have become institutionalized.

Yet it is with the passage of policy and legislation that we know our efforts are working. Policy change, although not the only litmus test, is a critical benchmark for transformative shifts within our communities. Policies are the laws of the land, and thereby function to reflect our values, define our collective problems, prioritize our issues, allocate our public resources, and identify eligibility for conferred status and public services.

Policy change never happens within a vacuum, it will be critical to accompany it with community conversations that will allow for the cultural change to grow, unlearn, evolve, embed and become the prevailing norm and custom of our communities.

With this Tribal Equity Toolkit, you have in your hands a powerful tool that helps illuminate the way. It now awaits your courage, political will and perseverance to make it a reality for generations to come.

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## CHAPTER 2: FAMILY

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### PART A: MARRIAGE

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Marriage is one of the few times where people reveal their hearts, make a public promise of love and responsibility for each other and ask their friends and family to hold them accountable. Committed couples, whether they are gay or straight, hope to marry for similar reasons – to make a lifetime promise to share the joys and sorrows that life brings.

Marriage also strengthens families. It provides the tools and the security to build a life together, and protect the people we love. And marriage is a key building block for strong communities.

The simple truth is that the word marriage has power. It says “we are family” in a way that no other word does. While Domestic Partnerships provide some of the protection of marriage, it is simply not the same. In Oregon, and elsewhere, same-sex couples that have domestic partnerships have been barred from a dying partner’s bedside, and denied the ability to say goodbye to the person they love. That just doesn’t happen when you’re married.

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>5</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>6</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;

- Laws providing family leave benefits;
- Laws governing victim’s compensation benefits;
- Laws governing worker’ compensation benefits; and
- Laws relating to title, tenure, inheritance, survivorship, or other acquisition, ownership, or transfer of real and personal property.<sup>7</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>8</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>9</sup> There are numerous other financial challenges for same-sex couples, for which legal marriage at least partially shields different-sex couples.<sup>10</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);
- Second-parent adoption (in most states);
- Foster parenting (in some states);

### **Defense of Marriage Act**

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

On October 18, 2012, the Second Circuit Court of Appeals ruled that the DOMA unconstitutionally discriminates against married same-sex couples. The constitutionality of DOMA has also been challenged in other courts, and will likely be reviewed by the U.S. Supreme Court. In 2011, the Obama administration instructed the Justice Department to stop defending the constitutionality of DOMA in court. In addition, in 2009, to achieve greater equality for the federal workforce, President Obama extended to same-sex domestic partners the federal employment benefits currently available to married couples, in areas in which statutory authority

- 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>11</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 marriage equality nevertheless suggest that marriage equality is unnecessary because gay and lesbian couples can obtain rights and protections similar to those afforded by marriage through other legal agreements.<sup>12</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>13</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>14</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>15</sup> and federal law denies these partners many benefits available to opposite-sex spouses.<sup>16</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>17</sup>

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## BENEFITS OF MARRIAGE EQUALITY

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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>18</sup>

Marriage equality also 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>19</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>20</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>21</sup>

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## TRIBAL RECOGNITION OF MARRIAGE EQUALITY AND STATE LAW

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Same-sex marriage is currently recognized by two Indian tribes: the Coquille Indian Tribe,<sup>22</sup> located in Oregon, and the Suquamish Tribe,<sup>23</sup> located in Washington. Massachusetts, Iowa,<sup>24</sup> New York,<sup>25</sup> Connecticut,<sup>26</sup> Vermont,<sup>27</sup> New Hampshire,<sup>28</sup> the District of Columbia,<sup>29</sup> and seven countries also recognize same-sex marriage.<sup>30</sup>

Some impacts of tribally-recognized same-sex marriages may differ depending on the laws of the state in which the tribe is located.<sup>31</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>32</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>33</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 marriage equality 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>34</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>35</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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The sample Tribal Marriage Equality Ordinance provided below has been compiled from the tribal, state, and international laws referenced above, 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 marriage equality 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 permits tribes and states to refuse to recognize marriages established under the laws of other tribes, states, and territories.<sup>36</sup> The provision above 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 marriage equality, 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.

A. 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.

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

C. 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.

## PART B: DOMESTIC PARTNERSHIPS AND CIVIL UNIONS

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State-recognized domestic partnerships and civil unions offer same-sex couples some or all of the benefits of marriage under state law.<sup>37</sup> “However, federal law still denies these partners important spousal benefits available to opposite-sex surviving spouses such as Social Security and Veteran’s benefits.”<sup>38</sup> In addition, “there is no guarantee that the partnerships will be recognized by other states or the federal government.”<sup>39</sup>

Furthermore, while “domestic partnerships and civil unions appear to be a milestone for gay, lesbian, and bisexual rights,”<sup>40</sup> they do “discriminately reserve the title of ‘married’ to opposite-sex couples.”<sup>41</sup> In doing so, “these marriage alternatives ‘perpetuate’ the societal distinction between those worthy of marriage and those who are not. In other words, ‘separate but equal . . . [is] inherently unequal.’”<sup>42</sup>

As recognized by a recent Connecticut Supreme Court decision in favor of marriage equality, a domestic partnership or civil union “entitles same-sex couples to all of the same rights as married couples except one, that is, 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>43</sup>

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### APPROACHES TO DOMESTIC PARTNERSHIPS AND CIVIL UNIONS:

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Tribes and states<sup>44</sup> have taken various approaches to domestic partnership and civil union legislation. For example, the Confederated Tribes of the Umatilla Indian Reservation,<sup>45</sup> Coquille Indian Tribe,<sup>46</sup> Oregon,<sup>47</sup> Washington,<sup>48</sup> California,<sup>49</sup> and Nevada<sup>50</sup> allow same-sex couples to enter into domestic

#### Use of Terms

Although the terms civil marriage, civil union, and domestic partnership are often used interchangeably, there can be significant distinctions between the terms. According to Pawelski et al.:

Civil marriage “is a legal status established through a license issued by a state [or tribal] government. Such status grants legal rights to, and imposes legal obligations on, the 2 married partners.”

A domestic partnership “is a relationship between 2 individuals, often but not necessarily of the same gender, who live together and mutually support one another as spouses but who are not legally joined in a civil marriage or a civil union. Some same-gender couples enter into domestic partnership agreements to create legally enforceable contracts involving property, finances, inheritance, and/or health care.”

A civil union “is a legal mechanism, sanctioned by civil authority, intended to grant same-gender couples legal status somewhat similar to civil marriage.”

partnerships that provide the same rights, benefits, and responsibilities as marriage under state law.<sup>51</sup> Similarly, Delaware,<sup>52</sup> New Jersey,<sup>53</sup> and Rhode Island's<sup>54</sup> civil union laws offer same-sex couples state-level spousal rights and responsibilities.

Other jurisdictions make domestic partners, partners joined in civil unions, or partners joined as reciprocal beneficiaries<sup>55</sup> eligible for only specified rights and benefits. For example, Maine's domestic partnership law makes registered domestic partners eligible to inherit without a will, make funeral and burial arrangements, be named a guardian or conservator if a partner becomes incapacitated or to be named a representative to administer a deceased partner's estate, make organ and tissue donations, and be protected under the state's domestic violence laws.<sup>56</sup> Likewise, Illinois' civil union law allows same-sex and opposite-sex partners to enter into civil unions, which provide some of the same benefits available to married couples, including the right to hospital visitation, disposition of a deceased partner's remains, and the right to make medical decisions.<sup>57</sup>

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### SAMPLE TRIBAL DOMESTIC PARTNERSHIP ORDINANCE

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For tribes that are not yet ready to adopt a marriage equality law, but nevertheless wish to provide same-sex partners with the rights, benefits, and responsibilities of marriage, a sample Tribal Domestic Partnership Ordinance is provided below. This draft ordinance has been compiled from the tribal, state, and international domestic partnership and civil union laws referenced above, with the majority of the language based on the laws of the Confederated Tribes of the Umatilla Indian Reservation, Coquille Indian Tribe, Oregon, California, New Jersey, and Delaware.

#### **Domestic Partnership Ordinance**

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

**Section 2. Declaration and Policy.** The [Tribal Council / Business Committee] finds that:

- A. The ability to enter into a committed, long-term relationship with another person that is recognized not only by friends and family, but also by the laws of the [insert name] Tribe (Tribe), is a significant and fundamental right.
- B. Without the ability to obtain legal status for their relationships, same-sex couples face numerous obstacles and hardships in attempting to secure legal protections and other rights and benefits for themselves and their children.

C. The Tribe has a strong interest in promoting stable and lasting families, including the families of same-sex couples and their children. Legislation that provides for the formation and recognition of domestic partnerships promotes stable and durable relationships and eliminates legal obstacles for same-sex couples. Such legislation reaffirms the Tribe’s obligation to insure equality for all of its members, and is essential to the political integrity, economic security, and health and welfare of the Tribe.

**Section 3. Purpose.** The purpose of this ordinance is to establish a domestic partnership system that will provide legal recognition to same-sex relationships under the laws of the Tribe, thereby ensuring more equal treatment of same-sex couples and their families under Tribal law.

**Section 4. Interpretation.** This ordinance shall be construed liberally in favor of finding that a domestic partnership is a valid civil contract entitled to be treated under Tribal law as a marriage would be treated.

A. A domestic partner shall be included in any definition or use of the terms “dependent,” “family,” “husband and wife,” “immediate family,” “next of kin,” “spouse,” “stepparent,” and other terms, whether or not gender-specific, that denote a spousal relationship or a person in a spousal relationship, as those terms are used throughout Tribal law, including the Tribal Code, administrative rules and regulations, court rules, governmental policies, common law, or any other provisions or sources of the laws of the Tribe.

B. Many of the Tribe’s laws are intertwined with federal law and state laws. The [Tribal Council / Business Committee] recognizes that the Tribe does not have the jurisdiction to control federal or states laws. To the extent that provisions of Tribal law adopt, refer to, or rely upon provisions of federal or state law in a way that otherwise would cause domestic partners to be treated differently than spouses, domestic partners shall be treated by Tribal law as if such federal or state law recognized a domestic partnership in the same manner as Tribal law.

**Commentary:** *An alternate provision, which could provide more protection to the Tribe but less protection to domestic partners, could read:*

“If any federal or state law or grant or regulation that is binding upon the Tribe prohibits the extension of privileges, immunities, rights, benefits, or responsibilities to domestic partners, or has negative consequences to the Tribe for the extension of such privileges, immunities, rights, benefits, or responsibilities to domestic partners, then the privilege, immunity, right, benefit, or responsibility shall not be extended to domestic partners.”

**Section 5. Definitions.** As used in this ordinance:

A. “Domestic partnership” means a legal relationship, entered into in person between two eligible persons of the same sex, which has been registered and certified pursuant to this



ordinance. A “domestic partnership” shall also include a domestic partnership or civil union that has been recognized by the Tribe pursuant to this ordinance.

B. “Domestic partner” means a person joined in a valid domestic partnership that has not been terminated.

C. “Sex” means the condition of being biologically female or male.

### **Section 6. Eligibility to Enter into Domestic Partnership; Prohibited and Void Domestic Partnerships.**

A. Two persons shall be eligible to enter into a domestic partnership if at least one of the persons is a member of the [insert name] Tribe and both persons:

1. Are at least 18 years of age and capable of consenting to the domestic partnership;
2. Are not married to, in a domestic partnership, or in a legal relationship substantially similar to a domestic partnership, with a different person;
3. Are not related by blood in a way that would prevent them from being married to each other under the laws of the Tribe; and
4. Are of the same sex.

**Commentary:** *Some statutes include additional criteria for the relationship, such as:*

1. Have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.
2. Are domiciled together under a long-term arrangement that shows a commitment to remain indefinitely responsible for each other’s welfare.
3. Consider themselves to be members of the other’s immediate family.
4. Agree to be jointly responsible for each other’s basic living expenses.
5. Share a common residence. Two persons may share a common residence even if any of the following apply:
  - a. Only one of the persons has legal ownership of the residence;
  - b. One or both of the persons have one or more additional residences not shared with the other person; or

- c. One of the persons leaves the common residence with the intent to return.

B. Domestic partnerships are subject to the same limitations and rights under Tribal law as void and voidable marriages.

**Commentary:** *A more detailed provision could read:*

1. A domestic partnership is prohibited and void when:
  - a. Either party to the domestic partnership has a partner, wife, or husband living at the time of the domestic partnership; or
  - b. The parties to the domestic partnership are first cousins or any nearer of kin to each other, whether of the whole or half blood, whether by blood or adoption, computing by the rules of the civil law. However, when the parties are first cousins by adoption only, the domestic partnership is not prohibited or void.

**Note:** *some tribes may want to include an exclusion for step-siblings, as well.*
2. When either party to a domestic partnership is incapable of making the civil contract or consenting to the contract for want of legal age or sufficient understanding, or when the consent of either party is obtained by force or fraud, the domestic partnership is void from the time it is so declared by a judgment of a court having jurisdiction of the domestic partnership.

**Section 7. Formation of Domestic Partnerships.** A domestic partnership shall be established under Tribal law when a Certificate of Registered Domestic Partnership is issued by the [Tribal Court / name of other entity issuing the certificate].

A. To request a Certificate of Registered Domestic Partnership, both persons wishing to enter into a domestic partnership must jointly file a signed Declaration of Domestic Partnership with the [Tribal Court Clerk / title of other staff issuing the certificate], in person, and pay the required filing fee.

**Commentary:** *This declaration process is based on a similar process used in Oregon and California. Other jurisdictions, such as the Confederated Tribes of the Umatilla Indian Reservation, Nevada, Delaware, and Hawaii, use a more detailed process for establishing domestic partnerships, which requires the issuance of a license and the solemnization of the domestic partnership (similar to the process for entering into a marriage).*

B. On the Declaration of Domestic Partnership, each person wishing to enter into the partnership shall:

1. Provide his or her full legal name, tribal affiliation if any, date of birth, age, place of birth, residence, and sex.
2. Declare that he or she is at least 18 years of age and otherwise capable of entering into a domestic partnership.
3. State whether he or she has previously been married, a partner in a domestic partnership, or in legal relationship substantially similar to a domestic partnership, and if so, provide a certified copy of the divorce decree or death certificate of the former spouse or partner or other proof that the previous marriage, domestic partnership, or other legal relationship has been terminated.
4. Declare his or her desire to enter into the domestic partnership with the other.
5. Expressly consent to the jurisdiction of the Tribe:
  - a. To authorize the domestic partnership;
  - b. For the purpose of any action for dissolution or annulment of the domestic partnership, or for legal separation of the partners in the domestic partnership; and
  - c. For any other proceeding related to the partners' rights and obligations or governing or concerning family relationships under the laws of the Tribe, even if one or both partners cease to reside or to maintain a domicile within the Tribe's jurisdiction.
6. Indicate the person's name after entering into the domestic partnership.

**Commentary:** *Some jurisdictions include additional requirements related to domestic partnership name changes. Additional language could read:*

**Section x. Surname upon entering into domestic partnership; legal effect.**

- A. Upon entering into a domestic partnership, either party to the domestic partnership may:
1. Retain his or her surname as it existed prior to the domestic partnership;
  2. Change his or her surname or middle name to the surname of the other party; or
  3. Change his or her surname to a hyphenated combination or other combination of

the surnames of both parties.

B. If a party requests a surname change under this Section, that party may also change his or her middle name to his or her surname prior to the domestic partnership.

C. The name of each party, as indicated on the Declaration of Domestic Partnership, shall become the sole legal name of each party after entering into the domestic partnership.

D. A request for a name change other than as described in this Section requires approval of the [Tribal Court or other approval entity], in accordance with [insert citation to Tribe's name change law].

7. Sign the form with a declaration that: "To the best my knowledge and belief, all representations made on this Declaration of Domestic Partnership are true, correct, and contain no material omissions of fact." The signatures of both partners must be affixed to one Declaration of Domestic Partnership form.

C. Each person wishing to enter into the partnership shall attach satisfactory, documentary proof of identification [, shared residence,] and Tribal membership to the Declaration of Domestic Partnership.

D. Each person each person wishing to enter into the partnership shall swear or affirm to the declaration before the [Tribal Court Clerk / title of other staff issuing the certificate].

E. Upon receipt of a Declaration of Domestic Partnership, in person, from both persons who wish to enter into the partnership, the [Tribal Court Clerk / title of other staff issuing the certificate]shall:

1. Confirm the identities[, residence,] and ages of each person, through examination of his or her photo identification or other reasonable proof satisfactory to the [Clerk / title of staff person].
2. Collect the filing fee for registering a Declaration of Domestic Partnership, which shall be established by the [Tribal Council / Business Committee].
3. Review the Declaration of Domestic Partnership to ensure that all requirements of this Section are met.

F. If the [Tribal Court Clerk / title of other staff issuing the certificate]is not satisfied with the documentary proof presented or questions whether the Declaration of Domestic Partnership meets all requirements of this Section, the Clerk shall submit the declaration and accompanying proof to a judge of the Tribal Court for an opinion as to its sufficiency.

G. If the Declaration of Domestic Partnership meets all requirements of this Section, the [Tribal Court Clerk / title of other staff issuing the certificate]shall:

1. Register the Declaration of Domestic Partnership in a domestic partnership registry; and
2. Issue a Certificate of Registered Domestic Partnership to the partners in person or at the mailing address provided by the partners. The registration certificate shall state that the partners have entered into a domestic partnership pursuant to this ordinance.
6. If one or both of the partners have chosen to change their name in accordance with the requirements of this ordinance, the registration certificate shall set forth the new name(s) of the partner(s).
7. The Certificate of Domestic Partnership shall be presumptive evidence of the domestic partnership in all courts.

H. This ordinance does not require the performance of any solemnization ceremony to enter into a domestic partnership. It is left to the partners entering into a domestic partnership to determine whether to seek a ceremony or other blessing over the domestic partnership.

I. The [Tribal Court Clerk / title of other staff issuing the certificate] shall maintain a public record of all Declarations of Domestic Partnership and Certificates of Domestic Partnership issued.

J. Filing an intentionally and materially false Declaration of Domestic Partnership is punishable as a misdemeanor.

**Section 8. Consent to Jurisdiction.** Each person signing a Declaration of Domestic Partnership consents to the jurisdiction of the Tribal Courts:

A. For the purpose of an action to obtain a judgment of dissolution or annulment of the domestic partnership;

B. For legal separation of the partners in the domestic partnership; and

C. For any other proceeding related to the partners' rights and obligations, even if one or both partners cease to reside or to maintain a domicile within the jurisdiction of the Tribe.

**Commentary:** *If the tribe lacks a Tribal Court, describe how the tribe will address dissolution, separation, etc.*

**Section 9. Rights, Benefits, and Responsibilities of Domestic Partners.**

A. Any privilege, immunity, right, or benefit granted by Tribal statute, administrative or court rule, policy, common law, or any other law to an person, and any responsibility imposed by Tribal statute, administrative or court rule, policy, common law, or any other law on an person, because the person is or was married, or because the person is or was an in-law in a specified way to another person, is granted on equivalent terms, substantive and procedural, to an person because the person is or was in a domestic partnership, or because the person is or was, based on a domestic partnership, related in a specified way to another person.

1. Any such privilege, immunity, right, benefit, or responsibility granted or imposed to or on a spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a partner with respect to a child of either of the partners.
2. Any such privilege, immunity, right, benefit, or responsibility granted or imposed to or on a former or surviving spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a former or surviving partner with respect to the child of either of the partners.
3. The rights and obligations of domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.

B. Domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses. No Tribal agency may discriminate against any person or couple on the grounds that the person is a domestic partner rather than a spouse or a party to a domestic partnership rather than a marriage, except as may otherwise be provided by Tribal law.

**Commentary:** *Some jurisdictions have chosen to limit the benefits available to the domestic partners of employees, including through provisions such as:*

- “The provisions of this ordinance do not require a non-Tribal public or private employer within the Tribe’s jurisdiction to provide health care benefits to or for the domestic partner of an employee or officer; provided, however, that nothing in this ordinance shall prohibit any public or private employer from voluntarily providing health care benefits to or for the domestic partner of an employee or officer upon such terms and conditions as the affected parties may deem appropriate.”
- “This ordinance does not require, on the basis of a domestic partnership, the extension of:
  1. Any retirement, deferred compensation, or other employee benefit plan, if the plan administrator reasonably concludes that the extension of benefits would conflict with a condition for tax qualification of the plan or a condition for other favorable tax treatment of the plan under the Internal Revenue Code or regulations adopted under the Internal Revenue Code; or

2. Any benefit under any employee benefit plan that is subject to federal regulation under the Employee Retirement Income Security Act of 1974.”

### **Section 10. Termination of Domestic Partnerships.**

A. A domestic partnership entered into or otherwise recognized under this ordinance may be dissolved in the same form and manner as marriages entered into or recognized under [insert citation to Tribal dissolution provision(s)].

**Commentary:** *Some jurisdictions, including Wisconsin, allow domestic partnerships to be terminated through a simplified procedure that involves the filing of a notice with the clerk who issued the Certificate of Registered Domestic Partnership. Other jurisdictions, such as Nevada, dissolve domestic partnerships in the same manner as a marriage, but also offer a simplified termination process for some domestic partnerships (such as: domestic partnerships that have been registered for 5 years or less, involve no minor children of the relationship, and involve no community or joint property; or domestic partnerships in which the parties have executed an agreement setting forth the division of property / liabilities), if the parties waive any rights to support (or have executed an agreement re: support) and waive the right to more comprehensive proceedings. In addition, depending on their divorce laws, tribes may wish to consider adding additional language, such as:*

“... ; provided, however, that the Tribal Court shall have, in addition to any other basis for jurisdiction, jurisdiction over all proceedings for termination of domestic partnerships that are entered into pursuant to this ordinance, notwithstanding that the domicile or residency of the petitioner and the respondent are not within the jurisdiction of the Tribe, if the jurisdiction of domicile or residency of the petitioner and/or the respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction.”

B. A person who has filed a Declaration of Domestic Partnership may not file a new Declaration of Domestic Partnership or enter a marriage with someone other than the person’s partner unless a judgment terminating the recent domestic partnership has been entered. This prohibition does not apply if the previous domestic partnership ended due to the death of one of the partners.

**Section 11. Recognition of Domestic Partnerships from Other Jurisdictions.** A registered domestic partnership, or other legal relationship substantially similar to a domestic partnership that extends benefits and responsibilities without the status of marriage, which has been legally entered into in another jurisdiction shall be recognized by the Tribe as a domestic partnership if the relationship meets the eligibility requirements of this ordinance and satisfactory proof of the relationship is provided.

**Section 12. 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 13. 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 14. 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 15. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]



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## PART C: CHILDREN

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*“Public policy designed to promote the family as the basic building block of society has at its core the protection of children’s health and well-being. Children’s well-being relies in large part on a complex blend of their own legal rights and the rights derived, under law, from their parents.”<sup>58</sup>*

Between one and nine million children in the United States are estimated to have at least one gay or lesbian parent.<sup>59</sup> “Yet current laws often deny such children legal ties to one parent, undermining family stability and permanency—and parents’ ability to act as effective guardians of their children.”<sup>60</sup>

At a minimum, adoption and parentage laws “should allow joint adoption by LGBT parents, recognize LGBT parents using assisted reproduction, and provide avenues such as second-parent adoption and de facto parenting to allow children to gain full legal ties to their parents.”<sup>61</sup> In addition, effective laws are needed to prevent discrimination based on Two Spirit / LGBT status during custody and visitation disputes, and to protect children involved in the child welfare system. These topics are discussed further in the sections that follow. Sample ordinance language is provided in each respective section.

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## ADOPTION

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Adoption is the process through which “an adult seeking to be a parent can establish a legal parental relationship to a child.”<sup>62</sup> When a person or family adopts a child, the adopting family is legally substituted for the child’s birth family, and the child becomes the legal child of the adopting parents.<sup>63</sup> Through adoption, a child’s adoptive parents take on the obligation to support and care for the child, and the child is protected in terms of inheritance or social security disability if a parent dies.<sup>64</sup>

Adoption of children by Two Spirit / LGBT persons may take the form of a joint adoption by a same-sex couple, adoption by a single Two Spirit / LGBT person, or adoption by one partner of the other partner’s biological child (known as step-parent adoption).<sup>65</sup> “Adoption provides LGBT individuals and couples with a critical way to ensure or create family relationships, whether (1) by bringing unrelated children into the family or (2) by securing the legal relationship of a second parent to the child of his or her partner or spouse.”<sup>66</sup>

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## THE LGBT ADOPTION DEBATE

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Adoption by same-sex couples is currently legal in approximately eleven U.S. states, plus the District of Columbia and Guam.<sup>67</sup> Judges have also approved adoptions by gay and lesbian parents in certain counties within many other states.<sup>68</sup> However, several states, including Utah and Mississippi, currently limit adoption options for same-sex couples.<sup>69</sup> More jurisdictions could follow with attempts to restrict or prohibit gay parenting.<sup>70</sup> The notions behind the anti-gay adoption movement are that children must have a mother and a father, and that gay people do not make good parents.<sup>71</sup>

In reality, research consistently shows that “children of LGBT parents fare just as well as other children.”<sup>72</sup> The medical, psychological, and social welfare communities agree “that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.”<sup>73</sup>

### **Best Interests of the Child**

Adoption is about securing the best interests of children—not about the rights of parents. “No one has the ‘right’ to be an adoptive parent. Although each state’s adoption process differs, the common thread among all is that an adoption proceeding asks whether a child’s adoption by a particular person or family is in that child’s best interests. These decisions are made by judges, often with the input of parents and child welfare professionals, and almost always after a home study by either a state agency or agency approved of by the state.”  
- *Adoption Questions & Answers*

“Every mainstream health and child welfare organization has issued policies opposing restrictions on parenting by lesbians and gay men.”<sup>74</sup> For example:

- According to the American Academy of Pediatrics, “[m]ore than 25 years of research have documented that there is no relationship between parents’ sexual orientation and any measure of a child’s emotional, psychosocial, and behavioral adjustment. These data have demonstrated no risk to children as a result of growing up in a family with 1 or more gay parents. Conscientious and nurturing adults, whether they are men or women, heterosexual or homosexual, can be excellent parents.”<sup>75</sup>
- The American Bar Association “has adopted a series of policies urging state legislatures and state courts to provide legal protections for children in families headed by unmarried or same-sex partners.”<sup>76</sup> The American Bar Association has also resolved to “support the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interests of the child.”<sup>77</sup>
- The North American Council on Adoptable Children has adopted the following practice and policy recommendation: “All prospective foster and adoptive parents, regardless of sexual orientation, should be given fair and equal consideration. NACAC opposes rules and legislation that restrict the consideration of current or prospective foster and adoptive parents based on their sexual orientation.”<sup>78</sup>
- According to the Child Welfare League of America: “Any attempt to preclude or prevent gay, lesbian, and bisexual individuals or couples from parenting, based solely on their sexual orientation, is not in the best interest of children.”
- The American Medical Association “will support legislative and other efforts to allow the adoption of a child by the same-sex partner, or opposite-sex non-married partner, who functions as a second parent or co-parent to that child.”
- The American Psychiatric Association “supports initiatives which allow same-sex couples to adopt and co-parent children and supports all the associated legal rights, benefits, and responsibilities which arise from such initiatives.”

Finally, it is important to note that roughly 115,000 children in America awaiting permanent homes.<sup>79</sup> These children need nurturing foster or adoptive parents—regardless of their sexual orientation. Therefore, it “is in the best interests of children that all qualified adults who have the room in their hearts and homes to adopt a child are permitted to do so, and are treated fairly in the process.”<sup>80</sup> Two Spirit / LGBT foster and adoptive parents “can provide a loving, stable home, responsive to the needs of LGBT youth in care, and are a largely untapped resource—an estimated 2 million LGB individuals are interested in adopting.”<sup>81</sup>

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## ADOPTION OF UNRELATED CHILDREN

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A person or couple unrelated to a child “may adopt a child (a) who is in the legal custody of a state agency, or (b) who has been placed with a private child welfare agency, or (c) who is secured as the result of a private agreement.”<sup>82</sup> Non-relative children may be adopted through a single parent adoption or through a joint adoption.

Single parent adoption occurs when one person adopts a child, as an individual (even if other adults live in the home of the adoptive parent). After the adoption, the child has one legal parent.<sup>83</sup> It is not uncommon for gay and lesbian people, *as individuals*, to adopt children through single parent adoption.<sup>84</sup> In many jurisdictions, “while some couples raise an adopted child together, only one of them may have officially become the adoptive parent because some agencies prohibit same-sex couples from adopting together but permit an LGBT individual to do so.”<sup>85</sup>

A joint adoption (sometimes known as coparent adoption) occurs when a couple (whether gay, lesbian, or heterosexual), together, jointly adopts a child who was not previously the legal child of either party. After the adoption, the child has two legal parents.

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## TRIBAL TWO SPIRIT / LGBT ADOPTION LAWS

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Many tribes permit any person to petition to adopt a child. For example, the Tulalip and Grand Ronde tribes allow “[a]ny adult, twenty-one (21) years of age or older [to] file a Petition for Adoption.”<sup>86</sup> Similarly, according to the Tribal Code of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians:

The following persons may adopt:

- (a) Any adult may file a petition to adopt.
- (b) In the case of married persons, not legally separated, both spouses shall be petitioners except that, if one of the spouses is the natural parent of the minor to be adopted, the natural parent shall not be a party to the petition.
- (c) A married person legally separated may adopt without the consent of his spouse.<sup>87</sup>

We found only one tribal law that specifically addresses adoption by Two Spirit / LGBT individuals and/or couples: the Confederated Tribes of Siletz Indians' permits domestic partners to petition to adopt a child. According to their Juvenile Code:

- (1) Any adult may file a petition to adopt a child.
- (2) Married persons or *domestic partners who maintain a home together shall both petition for adoption*. If one of the spouses is the biological parent of the child to be adopted, the biological parent shall not be a party to the petition.
- (3) A person who is legally separated from his or her spouse may petition to adopt a child without the consent of his or her spouse.<sup>88</sup>

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### STATE LGBT ADOPTION LAWS

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Like tribes, the “laws and policies in many States do not directly address the issue of adoption by LGBT individuals and/or couples.”<sup>89</sup> Most states, including Oregon and Washington, permit any person to petition to adopt.<sup>90</sup> Some state laws specify that an unmarried adult may petition to adopt, or a married couple may jointly petition to adopt.<sup>91</sup> Courts in several of these states have ruled that joint adoption petitions by unmarried individuals may also be considered.<sup>92</sup> For example, in 2007, the Maine Law Court ruled that Maine’s adoption law allows joint petitions by unmarried couples, regardless of whether the couple is adopting from the state or forming a legal relationship between the child and the second parent.<sup>93</sup> In addition, “[j]oint adoptions by gay and lesbian couples now happen in every New England state, but in some circumstances are tied to whether the couple has a legal status like a civil union or marriage.”<sup>94</sup>

Several states prohibit discrimination against LGBT individuals in adoption processes.<sup>95</sup> For example, New York regulations state: “Applicants shall not be rejected solely on the basis of homosexuality. A decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it relates to the best interests of adoptive children.”<sup>96</sup> In addition, Connecticut’s Department of Children and Families website states: “Foster care and adoption by same gender couples (both married and those couples living in the same household) is permissible and supported.”<sup>97</sup> In another example, according to Oregon’s Department of Human Services’ website:

Families are as diverse as the children needing homes. Each comes from their own different life experiences, levels of education, income, occupations, and lifestyles. Successful families are caring people who are ready to make a commitment to a child, and are open to learning new things.

- *You can be single, married, or domestic partners*
- *You can live in a house or apartment, but must have room to house a child*
- *You can work inside or outside the home*  
*You must be at least 21 years of age or older*
- *You must have sufficient income to support your family*
- *You must be able to physically care for a child*
- *You must pass a child abuse and criminal background check*

Diversity. Oregon welcomes and supports all families equally. Families of every race, culture, and ethnicity are needed to help children grow with a strong sense of racial and cultural identity. *Applicants are considered regardless of race, ethnicity, gender, religion or sexual orientation.*<sup>98</sup>

Other state regulations require adoption petitions to be considered without regard for sexual orientation, as well as other protected statuses. For example, New Jersey's DYFS is specifically required to allow any adult to petition to adopt, regardless of sexual orientation: "The Division shall allow any adult to apply to be an adoptive parent regardless of age, race, color, national origin, disability, gender, religion, sexual orientation, or marital status."<sup>99</sup>

In addition, according to the Nevada Administrative Code: "The application process for the adoption of a child through an agency which provides child welfare services must be available to all persons regardless of age, color, race, gender, sexual orientation, ethnicity, disability, income, religion or national origin. These factors must be considered only to the extent that they affect or may affect the ability of a person to meet the needs of a specific child."<sup>100</sup> Similarly, Maryland regulations state that an individual's application to be an adoptive parent may not be denied because: "Of the applicant's or adoptive child's race, color, culture, national origin, sexual orientation, or ethnic heritage."<sup>101</sup>

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## SECOND PARENT ADOPTION

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Countless same-sex couples co-parent children. However, due to a combination of marriage laws and adoption statutes, same-sex couples with children must often designate only one parent as the legal parent of the child.<sup>102</sup> "This is because the status as a legal parent is automatically conveyed to the parent who has a biological connection to a child,"<sup>103</sup> such as in the case of children born through artificial insemination,<sup>104</sup> in vitro fertilization, surrogacy, or past heterosexual relationships. This issue may also arise when one partner has a child that he or she previously adopted as a single individual,<sup>105</sup> or when a gay or lesbian couple is adopting a child together in a jurisdiction that prohibits same-sex couples from adopting children in both partners' names.

Second parent adoption provides an opportunity for a child’s non-biological parent to create a legal relationship with his or her partner’s biological child.<sup>106</sup> Second parent adoption is “a legal process in which a child who is already the child of one member of an unmarried couple (gay, lesbian or heterosexual) is adopted either through a joint petition by both members of the couple (even though one of them is already the child’s parent) or through an individual petition by the member of the couple who is not yet the child’s parent, depending on the procedures of the [jurisdiction]. After the adoption, the child has two legal parents.”<sup>107</sup>

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### IMPORTANCE OF SECOND PARENT ADOPTION

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Second parent adoption provides a child with two legal parents—both of whom are legally obligated to provide support and care for the child.<sup>108</sup> In addition, because second parent adoption typically grants the adoptive parent the same legal rights as a biological parent, second parent adoption allows family ties to be maintained upon the separation of a couple or the death of one parent. Without an adoption, a Two Spirit / LGBT parent “who is not legally recognized as a parent can lose custody or visitation rights, even in instances when that parent is the most suitable caregiver and has acted as a parent for the child’s entire life.”<sup>109</sup>

As one court has recognized, when biological or adoptive parents separate from or predecease non-legal parents:

[T]he children often remain in legal limbo for years while their future is disputed in the courts.... In some cases, children have been denied the affection of a functional parent who has been with them since birth, even when it is apparent that this

**NOTE:** Detailed discussions of stepparent adoptions, assisted reproductive technologies, and de facto parenting are beyond the scope of this publication—but nevertheless warrant mention. It is our hope to address these topics in more depth in our next edition.

***Stepparent Adoption:*** Many jurisdictions permit the new spouse of a child’s parent to become that child’s parent through adoption. Stepparent adoptions are thus available in jurisdictions that permit same-sex marriage, and in some states that provide for civil unions and domestic partnerships.

***Assisted Reproductive Technologies:*** Sources providing a more detailed discussion of the issues involved in determining the parentage of children born through assisted reproductive technologies include: Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U.L.Rev. 227-294 (2006); *In re Parentage of Robinson*, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005); *Della Corte v. Ramirez*, 81 Mass. App. Ct. 906 (2012); GLAD, *Adoption Questions & Answers*, <http://www.glad.org>.

***De Facto Parenting:*** Non-biological parent caregivers, such as same-sex partners of parents, often play critical roles in the upbringing of children. Fourteen states currently have de facto parenting statutes, which recognize the rights of such caregivers as “de facto parents.”

outcome is contrary to the children’s best interests. Adoption serves to establish legal rights and responsibilities so that, in the event that problems may arise in the future, issues of custody and visitation may be promptly resolved by reference to the best interests of the child...<sup>110</sup>

Second parent adoption also provides assurances that a child’s relationship to both parents will be recognized across jurisdictions, which is especially important for families due to the disparate treatment of same-sex couples. For example, although “a child born to a married same-sex couple or to a couple in a civil union is presumed to be the child of both members of the couple and both should be listed as parents on the birth certificate,<sup>111</sup> another state might not respect that presumption if the couple moves or if they separate and one party relocates.”<sup>112</sup> A court judgment of adoption creates a legal parent-child relationship that should be respected by other tribes and states, even if those tribes or states have not extended rights to same-sex couples.

Second parent adoption is thus a win-win situation—and has received broad support.<sup>113</sup> For example, in a 2002 policy statement, the American Academy of Pediatrics strongly endorsed second parent adoption.<sup>114</sup> In addition, in 2003, the American Bar Association adopted a position statement supporting state laws and court decisions permitting second-parent adoptions by unmarried persons who are functioning as a child’s parents, when such adoptions are in the best interests of the child.<sup>115</sup>

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## APPROACHES TO SECOND PARENT ADOPTION

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We have not found any tribal laws or court cases specifically addressing second parent adoption. Most states do not explicitly permit—or prohibit—second parent adoptions.<sup>116</sup> Only approximately three states have adopted legislation providing for second parent adoptions.<sup>117</sup>

Where permitted, second parent adoptions generally occur through a joint petition by both members of the couple (even though one of them is already the child’s parent), or through an individual petition by the member of the couple who is not yet the child’s parent.<sup>118</sup> For example, Vermont law states: “If a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary in an adoption under this subsection.”<sup>119</sup> In Colorado, a child may be adopted by a specified second adult parent upon the written and verified consent of the child’s sole legal parent if the child has no other legal parent.<sup>120</sup>



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## SAMPLE TRIBAL CHILD ADOPTION EQUALITY ORDINANCE

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The sample Tribal Child Adoption Equality Ordinance set forth below has been compiled from the tribal and state laws referenced above, and is based primarily on Colorado law.<sup>121</sup> This draft ordinance allows tribes who currently provide for adoptions to explicitly permit adoption by Two Spirit / LGBT individuals and couples, including second parent adoptions.

### Child Adoption Equality Ordinance

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

**Section 2. Declaration and Policy.**

A. The [Tribal Council / Business Committee] finds that:

1. The best interests of children are promoted by having persons in each child’s life who manifest a deep concern for the child and his or her growth and development, and when a child is part of a loving, supportive, and stable family, regardless of the sexual orientation or gender identity of the family’s members.
2. Sexual orientation and gender identity should not affect a person’s legal ability to be a parent.
3. Promoting equality in the adoption process is essential to the political integrity, economic security, and health and welfare of the Tribe.

B. The [Tribal Council / Business Committee] declares that it is the policy of the Tribe that the sexual orientation or gender identity of a prospective adoptive parent shall not be a bar to adoption when the adoption is determined to be in the best interests of the child.

**Section 3. Purpose.** The purpose of this ordinance is to promote equal treatment of potential adoptive parents under Tribal law by prohibiting discrimination on the basis of sexual orientation and gender identity in the adoption process and by authorizing second parent adoptions.

**Section 4. Addition of Definitions.** The Tribe’s [domestic relations; family law] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding four new sections, to read as follows:

**[citation].** “Domestic partner” means a person joined in a valid domestic partnership that has not been terminated.

**[citation].** “Domestic partnership” means a legal relationship, entered into in person between two eligible persons of the same sex, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

**Commentary:** Tribes may wish to broaden the definition of “domestic partnership.” As drafted, “domestic partnership” includes only legally recognized relationships. Therefore, this provision does not allow for joint adoptions by same-sex partners who are barred by tribal or state law from entering a legally recognized relationship. Accordingly, couples in tribal or state jurisdictions that do not recognize legal relationships between same-sex couples who seek to adopt together would be required to determine a primary adoptive parent, then incur additional expense of two separate adoption petitions (original and then second parent).

**[citation].** “Gender identity” refers to a person’s sense of being female, male, neither or some combination of both. When one’s gender identity and assigned sex at birth are not congruent, the individual may identify as transgender, transsexual, or genderqueer.

**[citation].** “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, or bisexuality.

**Commentary:** Tribes could choose to limit the definition of “domestic partner” to same-sex partners, as drafted above, or could expand the definition to include committed opposite-sex partners who have not married.

**Section 5. Petition for Adoption.** The Tribe’s [domestic relations; family law] [code; ordinance; statute], [cite to specific provision describing who may petition to adopt a child], is amended to read as follows:

**[citation]. Who May Petition for Adoption.**

1. Single Parent Adoption. Any adult may file a petition to adopt a child.
2. Joint Adoption.
  - a. Where married persons or domestic partners maintain a home together, both spouses or domestic partners shall be

petitioners in a petition to adopt a child; provided, however, that if one of the spouses or domestic partners is the biological parent of the child to be adopted, the biological parent shall not be a party to the petition.

**Commentary:** Tribes could choose to use “may” in place of “shall” in the provision above to permit only one spouse or domestic partner to adopt the child.

- b. A person who is legally separated from his or her spouse or domestic partner may petition to adopt a child without the consent of his or her spouse or partner.

**Section 6. Non-Discrimination in the Adoption Process.** The Tribe’s [domestic relations; family law] [code; ordinance; statute], [cite to specific provision within the adoption chapter], is amended by adding two new sections, to read as follows:

**[citation]. Non-Discrimination in the Adoption Process.**

1. The process for applying to adopt of a child through the [name of tribe’s social services department] or other agency providing adoption services within the jurisdiction of the Tribe shall be available to all persons without regard to sexual orientation, gender identity, or marital status.
2. In determining whether an adoption is in the best interests of a child, the Juvenile Court shall not consider the sexual orientation or gender identity of the petitioner(s), except to the extent that sexual orientation or gender identity may affect the ability of a person to successfully parent and meet the needs of a specific child.

**[citation]. Policies Required.** Within 180 days of the adoption of this ordinance, the Tribe’s [insert name of social services department] shall adopt written policies prohibiting discrimination in the adoption process on the basis of sexual orientation and gender identity.

**Section 7. Second Parent Adoption.** The Tribe’s [domestic relations; family law] [code; ordinance; statute], [cite to specific provision within the adoption chapter], is amended by adding three new sections, to read as follows:

**[citation]. Second Parent Adoption Permitted.** If a family unit consists of the legal parent of a child and the parent’s spouse or domestic partner, and adoption is in the best interest of the child, the spouse or domestic partner may petition to adopt the child of the legal parent without requiring the legal parent to terminate their parental rights.

**Commentary:** *If the tribe's laws already permit stepparent adoption, this provision could read:*

"If a family unit consists of the legal parent of a child and the parent's domestic partner, and adoption is in the best interest of the child, the domestic partner may petition to adopt the child of the legal parent/ in the same manner as stepparents may adopt a child."

**[citation]. Availability of a Child for Second Parent Adoption.** A child may be available for second parent adoption only upon verification that:

1. The child has a only one legal parent;

**Commentary:** *Tribes may not want to limit second parent adoption in this way: some commentators recognize that there are circumstances in which more than two legal parents may be in a child's best interest.*

2. The child's legal parent consents to the adoption of the child by his or her spouse or domestic partner; and
3. Adoption is in the best interest of the child.

**[citation]. Home Study Report Required.** Upon receipt of a petition for a second parent adoption, the court shall require the [name of tribal social services department] to prepare a written home study report.

**Commentary:** *If tribal law does not require stepparents to undergo the cost and invasiveness of a home study during the second parent adoption process, same-sex couples should not be required to do so.*

1. If the child was adopted by his or her legal parent less than six months prior to the filing of an adoption petition by a second prospective parent, and if the second prospective parent was included in the home study report that was prepared for the adoption of the child by the first parent, that home study report shall be a valid home study report for the purpose of the second parent's adoption.
2. If the filing of a petition for adoption by the second prospective parent occurs six months or more after the child was adopted by the first parent, a separate home study report shall be required.

**Section 8. 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 9. 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 10. 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 11. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]

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## CHILD CUSTODY AND VISITATION FOR TWO SPIRIT / LGBT PARENTS

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*“Even when some legal protections exist, discrimination can still wrongly wrest children from their parents when, for example, custody decisions are driven by anti-gay bias against a parent, rather than by the child’s best interests.”<sup>122</sup>*

In child custody and visitation matters, legislation usually requires decisions to be made based on the best interests of the child.<sup>123</sup> Most child custody and visitation statutes therefore do not specifically address sexual orientation or gender identity.<sup>124</sup> As a result, courts typically will not consider a parent’s sexual orientation or gender identity in custody and visitation disputes unless these factors are shown to adversely affect or harm the child.

Several courts have declined to make custody decision based on sexual orientation, or have struck down custody or visitation decisions that have incorrectly considered the sexual orientation of a parent. For example, a 2002 Oregon Court of Appeals case determined that the sexual orientation of a mother could not be a significant factor in determining custody.<sup>125</sup> Similarly, in 1994, New York’s appeals court confirmed that where a parent’s sexual preference does not adversely affect the children, it is not determinative in a child custody dispute.<sup>126</sup>

The American Bar Association has nevertheless adopted a policy supporting “the enactment of legislation and implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation.”<sup>127</sup> In one example of such legislation, the District of Columbia requires: “In any proceeding between parents in which the custody of a child is raised as an issue, the best interest of the child shall be the primary consideration. The race, color, national origin, political affiliation, sex, sexual orientation, or gender identity or expression of a party, in and of itself, shall not be a conclusive consideration.”<sup>128</sup>

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## SAMPLE TRIBAL CHILD ADOPTION EQUALITY ORDINANCE

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The sample tribal custody and visitation ordinance amendment set forth below is based primarily on District of Columbia law. This draft language allows tribes with existing custody and visitation laws to amend those laws to promote equal parenting rights for Two Spirit / LGBT parents.

**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]. Best Interests of the Child.** In any proceeding between parents in which the custody of or visitation with a child is at issue, the best interest of the child shall be the primary consideration. The sexual orientation or gender identity of a party, in and of itself, shall not be a conclusive consideration. For purposes of this Section:

1. “Gender Identity” refers to a person’s sense of being female, male, neither or some combination of both. When one’s gender identity and assigned sex at birth are not congruent, the individual may identify as transgender, transsexual, or genderqueer.
2. “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, or bisexuality.

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## CHILD WELFARE

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### TWO SPIRIT / LGBT FOSTER OR ADOPTIVE HOMES

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*“As of 2009, there were more than 423,000 children in foster care; with ~115,000 of these awaiting adoption. An estimated 14,000 foster children, or 3% of all foster children, currently live with LGB foster parents.”<sup>129</sup>*

Several states, including North Dakota, Arkansas, Nebraska, and Utah, prohibit or restrict foster parenting by LGBT individuals and/or families.<sup>130</sup> In addition, in some other jurisdictions, “[a]lthough not expressly forbidden by statute or regulation, gay and lesbian individuals have been denied the ability to apply for foster parenting as a result of unwritten administrative policies of some state agencies.”<sup>131</sup>

In contrast, several states, including California, Oregon, Massachusetts, and New Jersey, prohibit discrimination against LGBT individuals in the foster parenting process.<sup>132</sup> For example, California’s 2003 Foster Care Non-Discrimination Act prohibits discrimination in the foster care system on the basis of several actual or perceived characteristics, including sexual orientation and gender identity.<sup>133</sup> This law also explicitly includes protections for LGBT youth and adults involved with the foster care system.<sup>134</sup> In addition, the Act mandates initial and ongoing training for all group home administrators, foster parents, and department licensing personnel.<sup>135</sup>

At the federal law, although a bill in Congress that would withhold federal funds from states that discriminate against LGBT people in foster placements or adoption died in committee in 2011, U.S. Senator Kirsten Gillibrand (D-N.Y.) and U.S. Rep. Pete Stark (D-Calif.) are expected to introduce similar bills again.<sup>136</sup> In addition, in April 2011, the U.S. Department of Health and Human Services (HHS) issued a memo to state, tribal, and territorial agencies that administer federal child welfare funds. The memo called prospective LGBT parents “a largely untapped resource” for providing foster or adoptive homes to LGBT young people and recognized that LGBT foster and adoptive parents “can provide a loving, stable home, responsive to the needs of LGBT youth in care.”<sup>137</sup>

With the exception of the Hoopa Valley Tribe, which recognizes the right of foster children to be free from discrimination or harassment, including on the basis of actual or perceived sexual orientation or gender identity,<sup>138</sup> we did not find any tribal laws specifically address Two Spirit / LGBT-related child welfare issues.



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## LGBT YOUTH IN THE CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS

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*“During the past decade, lesbian, gay, bisexual, and transgender (LGBT) adolescents have become increasingly visible in our families, communities, and systems of care. A significant number of these youth are in the custody of child welfare or juvenile justice agencies. Yet the public systems that are charged with their care and well-being have been unresponsive to their needs and slow to acknowledge that LGBT children and adolescents are in urgent need of appropriate and equitable care.”<sup>139</sup>*

*“Child welfare and juvenile justice professionals must be aware of the rights of LGBT young people. They also must take these rights into consideration in both practice and policy making.”<sup>140</sup>*

All young people in out-of-home state custody, whether through the child welfare or juvenile justice system, “are entitled to equal protection of the law and have the right to safety while in care.”<sup>141</sup> This safety includes the right to be protected from physical and sexual abuse at the hands of foster parents, facility staff, social workers, other youth, and other individuals that provide for their care, as well as protection from mental and emotional harm.

Two Spirit / LGBT youth in out-of-home custody share this right to protection. However, many “[c]hild welfare and juvenile justice systems have not incorporated advances in research and understanding related to human sexuality and child and adolescent development... As a result, these systems continue to deliver misguided, uninformed, second-class care to LGBT youth in their custody.”<sup>142</sup> As a result, the physical and emotional well-being of Two Spirit / LGBT youth “is at risk if the young person is harassed or mistreated based upon their actual or perceived sexual orientation or gender identity. LGBT youth in the child welfare system often face disapproval and rejection from their caretakers – including foster parents, kinship care providers and group home staff.”<sup>143</sup>

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## PROTECTING THE RIGHTS OF TWO SPIRIT / LGBT YOUTH IN CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS

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“With few exceptions, policies and professional standards governing services to youth in out-of-home care fail to consider the young people’s sexual orientation or gender identity. The lack of leadership and professional guidance related to these key developmental issues has left a

vacuum that is often filled by harmful and discriminatory practices based on personal biases related to adolescent sexuality and gender identity rather than informed, evidence-based policies and guidelines.”<sup>144</sup>

However, some jurisdictions are taking steps to ensure that their policies address the needs of Two Spirit / LGBT children in the child welfare and juvenile justice systems. For example, as mentioned above, the Hoopa Valley Tribe has adopted a Bill of Rights of Foster Children that includes the right: “To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.”<sup>145</sup>

In addition, some states have adopted non-discrimination laws that explicitly protect LGBT youth in child welfare and juvenile justice systems. For example, California’s Foster Care Non-Discrimination Act “makes it unlawful for county child welfare departments, group home facilities, and foster family agencies to discriminate on a number of bases, including actual or perceived sex, sexual orientation, gender identity, or HIV status. Under this law, all foster children and persons engaged in providing care and services to foster children in California have the right to fair and equal access to all available child welfare services, placements, care, treatment, and benefits, and to be free from discrimination or harassment on these bases.”<sup>146</sup>

At the federal level, the 2011 HHS memo discussed above encouraged child welfare agencies to better serve the needs of “lesbian, gay, bisexual, transgender and questioning (LGBT) youth” in the foster care system.<sup>147</sup> Several state agencies have already adopted policies or practice guides that include protections for LGBT youth. For example, the Alameda County Social Services Agency’s LGBT Policy requires:

Lesbian, gay, bisexual, transgender, and questioning (LGBT) children and youth, or those perceived to be LGBT, are entitled to the same care, support, and protections that are provided to all children and youth served by the Department of Children and Family Services. This policy is in keeping with the Department of Children and Family Services’ commitment to the safety, permanence, and well being of the children and youth we serve. DCFS is committed to treating all children and youth with respect, valuing and affirming differences, and preventing harassment or discrimination of any kind.

Sexual orientation and gender identity must be affirmed, respected, and considered in all decisions regarding placement, care, manner of treatment and benefits received. Safety concerns must be considered when evaluating the placement needs of LGBT children and youth. LGBT children and youth are entitled to support for

their positive expression and development of their identities, in the same manner as their peers. Anti LGBT violence, the use of slurs, jokes, namecalling or other forms of real or perceived verbal, nonverbal, or emotional harassment based on sexual orientation or gender identity is prohibited. Employees, resource families, care providers, and community members who provide services to children and youth will be treated with respect. Differences will be affirmed and harassment prevented and addressed. Discrimination based on sexual orientation and gender identification will not be tolerated.<sup>148</sup>

Similarly, New York's Division of Child Protection's policies include the following protections:

- "When assessing safety and risk of an LGBT child or young person, Children's Services staff must, in addition to looking for other safety factors, assess whether a parent's attitude about the child's actual or perceived sexual orientation and/or gender identity is contributing to the parent's behavior, and in turn, whether the parent's behavior is impacting upon the child's safety or placing a child at risk."
- "Division of Child Protection prohibits staff from acting in a discriminatory manner toward LGBT youth."
- "When interviewing a transgender young person, CPS should take care to address the child by the name that he/she prefers to be called, which may be a name associated with a gender different than the child's biological gender."
- "Under no circumstances is any staff member of Children's Services to attempt to convince an LGBPQ child or young person to reject or modify his/her sexual orientation or gender identity."
- "LGBT young people do not always feel comfortable disclosing information about their sexual orientation and/or gender identity. It is therefore not appropriate to directly ask a young person if he or she is LGBT. Instead, the CPS should use sensitive and inclusive language that signals to all young people that they will be treated with respect and dignity, regardless of how they identify."<sup>149</sup>

## SAMPLE TRIBAL CHILD WELFARE AND JUVENILE JUSTICE NON-DISCRIMINATION ORDINANCE:

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The sample Tribal Child Welfare and Juvenile Justice Non-Discrimination Ordinance set forth below has been compiled from the laws referenced above, and is based primarily on California's Foster Care Non-Discrimination Act.<sup>150</sup> This draft ordinance allows tribes with existing laws protecting the rights of children in the tribe's child welfare or juvenile justice systems to expand those laws to promote equality.

### **Child Welfare and Juvenile Justice Non-Discrimination Ordinance**

**Section 1. Title.** This ordinance shall be known as the "Child Welfare and Juvenile Justice Non-Discrimination Ordinance of the [insert name] Tribe."

**Section 2. Declaration and Policy.** The [Tribal Council / Business Committee] finds and declares that:

- A. Children in child welfare and juvenile justice systems are harmed by discrimination based on sexual orientation and gender identity, whether that discrimination is directed at them, their caregivers, or service providers.
- B. The [insert name of Tribal social services agency] (Department) provides programs and services to protect children and families within the Tribe's jurisdiction, including programs and services related to the care, placement, and supervision of children who have been removed from their homes due to abuse, neglect, or involvement in the juvenile justice system.
- C. Two Spirit, or lesbian, gay, bisexual, transgender, and questioning (collectively referred to herein as LGBT) youth, or those perceived to be LGBT, are entitled to the same level of care, support, and protections that are provided to all children served by the Department.
- D. The Tribe is committed to treating all children and youth with respect, valuing and affirming differences, and preventing harassment or discrimination of any kind. The sexual orientation and gender identity of a youth must be respected in all child welfare and juvenile justice decisions regarding placement, care, manner of treatment, and benefits received.
- E. Promoting equality in the Tribe's child welfare and juvenile justice processes is essential to the political integrity, economic security, and health and welfare of the Tribe.

**Section 3. Purpose.** The purpose of this ordinance is to protect the rights of children, caregivers, potential foster and adoptive parents, and service providers in the child welfare and juvenile justice systems within the Tribe’s jurisdiction by prohibiting discrimination on the basis of sexual orientation or gender identity.

**Section 4. Interpretation.** Nothing in this ordinance shall be interpreted to create or modify existing Tribal preferences for foster placements or to limit the Department’s ability to make placement decisions for a child based on the child’s best interests.

**Section 5. Addition of Definitions.** The Tribe’s [juvenile; children’s] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding two new sections, to read as follows:

**[citation].** “Gender Identity” refers to a person’s sense of being female, male, neither or some combination of both. When one’s gender identity and assigned sex at birth are not congruent, the individual may identify as transgender, transsexual, or genderqueer.

**[citation].** “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, or bisexuality.

**Section 6. Non-Discrimination in in Child Welfare and Juvenile Justice Processes.** The Tribe’s [juvenile; children’s] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding a new section, to read as follows:

**[citation]. Non-Discrimination in Child Welfare and Juvenile Justice Processes.**

1. All children involved in the Tribe’s child welfare and juvenile justice systems, and all adults engaged in the provision of care and services to such children, including but not limited to, caseworkers, facility staff, foster parents and adoptive parents, and relative caregivers, shall have a right to:
  - a. Fair and equal access to all available and appropriate services, placements, care, treatment, and benefits; and
  - b. Be free from discrimination or harassment on the basis of sexual orientation or gender identity.
2. The application process to become a foster parent, adoptive parent, or relative caregiver for a child through the Department shall be available to all persons without regard to sexual orientation or gender identity.
  - a. Sexual orientation or gender identity may be considered only to the extent that such factors may affect the ability of a person or couple to

successfully meet the needs of a specific child.

b. In determining whether the placement of a child with a potential foster parent or parents is in the best interests of the child, the Department and the Juvenile Court shall not consider the sexual orientation or gender identity of the potential caregiver, except to the extent that such factors may affect the ability of a person to successfully meet the needs of a specific child.

3. Once foster parents, adoptive parents, or relative caregivers accept a child into their home, they have a legal responsibility to provide care to the child without discrimination on the basis of the child's actual or perceived sexual orientation or gender identity.

**Section 7. Policies Required.** Within 180 days of the adoption of this ordinance, the Department shall adopt written policies prohibiting harassment and discrimination on the basis of actual or perceived sexual orientation and gender identity. The policies shall:

A. Apply to all Department personnel, providers who contract to serve children in the Department's custody, and all direct care providers, including foster parents, adoptive parents, relative caregivers, and facility staff.

B. Include a formal grievance procedure that allows for confidential complaints and neutral third-party investigations.

C. Be widely distributed to promote understanding and compliance, including, at a minimum, by:

1. Including a copy of the policies in the staff training or orientation for every new employee, contractor, and caregiver;
2. Posting the policies in Department offices, group care facilities, courtrooms, and other strategic locations; and
3. Including the policies in any written handbook or orientation materials provided to youth entering the system;
4. Discussing the policies with every child who is capable of understanding it; and
5. Including the policies in culturally and developmentally appropriate written materials designed for youth and their families.

**Commentary:** *Tribal policies could include the following types of provisions:*

1. *Policies that prohibit all forms of harassment and discrimination, including jokes, slurs, and name calling. “Adopting and enforcing a policy that prohibits violence, name calling, and other harassment or discrimination promotes equitable care for all young people. Such a policy does not infringe on individual beliefs about homosexuality or gender roles. Providers and staff members are free to hold any beliefs they choose, so long as they enforce and adhere to the agency’s nondiscrimination policy.”<sup>151</sup>*
2. *Policies that “permit youth to: disclose their sexual orientation to other youth, caregivers, and agency personnel; discuss their feelings of attraction to youth of the same sex, consistent with discussion of romantic attachments among heterosexual youth, without being penalized or shamed; participate in social activities that are geared toward or inclusive of lesbian, gay, and bisexual youth; express their sexual orientation through their choice of clothing, jewelry, or hairstyle; have access to LGBT-inclusive, supportive books and materials; and post LGBT-friendly posters or stickers in their rooms.”<sup>152</sup>*
3. *Policies that “ensure that agency employees respect confidential information related to a youth’s sexual orientation or gender identity,” including policies requiring that:*
  - *All employees working with youth should have a thorough understanding of the situations in which such information must / may be disclosed.*
  - *Unless disclosure is legally required, no employee should disclose information regarding the sexual orientation or gender identity of a youth unless that person can identify a direct benefit to the youth and has discussed the matter with the youth and obtained his or her consent.*
  - *Case managers should carefully consider the purpose, nature, and consequences of any contemplated disclosure, and should work with the youth to balance the potential negative consequences against the benefits of disclosure.*
  - *When disclosure is required or appropriate, the information disclosed and the means of disclosure should be limited to that which is necessary to achieve the specific beneficial purpose*
  - *Requiring the Department to take affirmative steps to ensure that all employees have a thorough understanding of applicable confidentiality laws and related policies and procedures.<sup>153</sup>*

**Section 8. Training Required.** Department staff, foster parents, adoptive parents, and relative caregivers shall receive training on the rights of children in out of home care to have fair and equal access to all available services, placement, care, treatment, and benefits, and to be free from discrimination and harassment on the basis of sexual orientation and gender identity.

**Section 9. 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 10. 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 11. 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 12. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]



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## CHAPTER 3: EMPLOYMENT

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*“In **29** states, it’s still legal to fire someone solely because they’re lesbian, gay, or bisexual; in **34** states it is legal to fire someone solely for being transgender.”<sup>154</sup>*

*“Employment discrimination against lesbian, gay, bisexual and transgender workers is pervasive and harmful. It violates core [values] of fairness and equality by discriminating against qualified individuals based on characteristics unrelated to the job.”<sup>155</sup>*

“LGBT people face serious discrimination in employment, including being fired, being denied a promotion and experiencing harassment on the job.”<sup>156</sup> Decades of research has provided “extensive evidence of discrimination against LGBT people, as well as evidence that sexual orientation discrimination results in economic harm to LGBT people, reducing their earnings by thousands of dollars.”<sup>157</sup>

Discrimination is also bad for businesses. Economists and businesses have long argued that businesses will be most successful when they recruit, hire, and retain employees on the basis of talent, not personal characteristics, including sexual orientation, that have no impact on an employee’s ability to perform a job well.”<sup>158</sup> In addition, “studies from various academic disciplines suggest that LGBT workers will be healthier and more productive workers if they have legal protection from discrimination.”<sup>159</sup>

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### BENEFITS OF EMPLOYMENT DISCRIMINATION LAWS AND POLICIES

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Currently, it is legal in 29 states to discriminate in employment based on sexual orientation. It is legal in 34 states to discriminate based on gender identity or expression.<sup>160</sup> No federal law consistently protects LGBT individuals from employment discrimination.

Research shows that nondiscrimination laws and policies that include sexual orientation and gender identity are likely to reduce employment discrimination—and promote productivity. For example, where laws banning employment discrimination have been adopted, evidence

suggests that the laws “have been effective in reducing wage gaps and employment discrimination against LGB people, in particular. Two recent studies using Census 2000 data found that state-level sexual orientation nondiscrimination laws reduced the gap in annual earnings for gay men.”<sup>161</sup>

“Perhaps the best evidence that nondiscrimination policies are good for business comes from the fact that many companies have voluntarily adopted policies” prohibiting employment discrimination.<sup>162</sup> For example, by 2010, “87 percent of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 46 percent had policies that include gender identity.”<sup>163</sup> In addition, “large companies report that they adopt these policies to improve employee retention, recruitment, and productivity, as well as to generate the best ideas and a stronger customer base.”<sup>164</sup>

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## APPROACHES TO PREVENTING EMPLOYMENT DISCRIMINATION TRIBES

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Many tribes have adopted non-discrimination laws that include language prohibiting discrimination based on sexual orientation. For example, the Shoshone-Bannock Tribes’ Worker Protection Ordinance makes it unlawful to take various employment actions “wholly or partially for a discriminatory reason based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, or political affiliation of any individual.”<sup>165</sup>

Similarly, the Mandan Hidatsa and Arikara Nation’s Employment Rights and Contracts Preference Ordinance makes it unlawful for covered employers “to fail or refuse to hire, or to discharge, any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion and training, or to engage in any other action that would deprive or tend to deprive any individual of employment opportunities, on the basis of” various characteristics, including sexual orientation.<sup>166</sup>

Using a basic internet search, we did not find any tribal laws providing explicit protects against discrimination based on gender identity.

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## STATES

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Approximately 21 states, plus the District of Columbia, have passed laws prohibiting employment discrimination based on sexual orientation. Approximately 16 states and D.C. prohibit discrimination based on gender identity.<sup>167</sup> Many of these states have adopted broad non-discrimination laws that also prohibit discrimination based on sexual orientation and/or gender identity in the areas of housing, public accommodations, education, real-estate transactions, public service, business, union membership, insurance, public works contracts, and/or access to financial credit.<sup>168</sup>

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## FEDERAL

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The proposed federal Employment Non-Discrimination Act (ENDA) would extend federal employment discrimination protections currently provided based on race, religion, sex, national origin, age, and disability to sexual orientation and gender identity.<sup>169</sup> The law would prohibit public and private employers, employment agencies, and labor unions from using an individual's sexual orientation or gender identity as the basis for employment decisions, such as hiring, firing, promotion or compensation.<sup>170</sup>

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## SAMPLE TRIBAL NONDISCRIMINATION IN EMPLOYMENT ORDINANCE

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The sample Tribal Nondiscrimination in Employment Ordinance provided below has been compiled based on the tribal, state, and federal laws referenced above, with the majority of the language based on Oregon,<sup>171</sup> California,<sup>172</sup> and Colorado<sup>173</sup> law. This draft ordinance allows tribes with existing anti-discrimination employment laws to expand the scope of protections to promote equality based on sexual orientation and gender identity. For tribes that have not yet adopted employment discrimination laws, the laws of the Blackfeet Nation,<sup>174</sup> the Nottawaseppi Huron Band of the Potawatomi,<sup>175</sup> and California offer examples.

### **Nondiscrimination in Employment Ordinance**

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

## **Section 2. Declaration and Policy.**

- A. The [Tribal Council / Business Committee] finds that:
1. All employees of the [insert name of Tribe] (Tribe) are entitled to a workforce environment that is free from unfair discrimination.
  2. The practice of unfair discrimination in employment against properly qualified individuals by reason of their sexual orientation or gender identity deprives those individuals of the earnings that are necessary to maintain a just and decent standard of living, and adversely affects the workforce, community, and Tribe.
  3. Promoting equality in employment is essential to the political integrity, economic security, and health and welfare of the Tribe.
- B. The [Tribal Council / Business Committee] declares that it is the policy of the Tribe to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment, without discrimination on the basis of sexual orientation or gender identity.

**Section 3. Purpose.** The purpose of this ordinance is to prohibit employment discrimination on the basis of sexual orientation or gender identity. Through the adoption of this ordinance, the Tribe seeks to promote equality in the workplace, and to prevent and remedy employment practices that discriminate on the basis of sexual orientation and gender identity.

**Section 4. Addition of Definitions.** The Tribe's [employment] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding four new sections, to read as follows:

**[citation].** "Committed relationship" means a relationship in which an employee and the domestic partner of the employee are each other's sole domestic partner (they are not married to or domestic partners with anyone else), and share responsibility for a significant measure of each other's common welfare and financial obligations.

**[citation].** "Domestic partner" means an adult in a committed relationship with another adult, including both same-sex and opposite-sex relationships. A domestic partnership includes but is not limited to any relationship between two individuals of the same or opposite sex that is granted legal recognition by a tribe or state as a marriage, domestic partnership, civil union, or similar relationship.

**Commentary:** *This broad definition of "domestic partnership" includes partners (same and different sex) that have not taken official action to formalize their relationship. Tribes may wish to limit this definition to more formal partnerships, such as through the following type of language:*

“Domestic partnership” means a legal relationship, entered into in person between two eligible persons of the same sex, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

**[citation].** “Gender Identity” refers to a person’s sense of being female, male, neither or some combination of both. When one’s gender identity and assigned sex at birth are not congruent, the individual may identify as transgender, transsexual, or genderqueer.

**[citation].** “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, or bisexuality.

**Commentary:** *If a tribe wishes to exempt religious entities from the requirements set forth in this ordinance, an additional definition could read as follows:*

For purposes of this Ordinance, “employer” shall not include any religious organization or association, except for any religious organization or association that is supported in whole or in part by Tribal funds or other money raised by taxation or public borrowing.

**Section 5. Prohibiting Employment Discrimination on the Basis of Sexual Orientation and Gender Identity.** The Tribe’s [employment] [code / ordinance / statute / policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding “sexual orientation and gender identity” to the list of protected classes. As revised, this Section shall read as follows:

**[citation].** [provide language of original provision, with “sexual orientation, gender identity” added]

**Section 6. Requiring Equality in Employee Benefits.** The Tribe’s [employment] [code / ordinance / statute / policy], [cite to code / ordinance / statute / policy], is amended by adding one new section, to read as follows:

**[citation]. Equality in Employee Benefits.** Any employment-related privilege, right, or benefit granted by statute, administrative or court rule, policy, common law, or any other law to an individual because the individual is or was married, or to an individual’s spouse or former spouse, shall be granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership, or to an individual’s domestic partner or former domestic partner. These privileges, rights, and benefits include but are not limited to:

1. An employee shall be granted a leave of absence, with pay, for the death of a

domestic partner or family member of a domestic partner to the same extent as for a spouse or family member of a spouse. Use of the term “in-law” in the Tribe’s employee policies shall include the similarly situated relatives of a domestic partner.

2. An employee shall be granted sick leave to care for a domestic partner to the same extent that employee are granted sick leave to care for a spouse, and to care for a dependent of a domestic partner to the same extent permitted to care for a child.
3. An employee shall be entitled to take parental leave to take care of a child born to a domestic partner or a newly adopted child to the same extent as a married person.

**Commentary:** *Most jurisdictions entitle eligible employees to take unpaid, job-protected medical leave and/or leave to care for themselves or for family members with serious health conditions. The provisions above allow tribes with existing family medical leave laws to amend those laws to allow employees to expand the eligible family relationships for which employee can take leave. For example, these provisions allow an employee to take unpaid leave to care for his or her domestic partner with a serious health condition. In addition, an employee could take unpaid leave to provide care for the child of his or her domestic partner, if the child has a serious health condition, even if the employee has no legal or biological relationship with the child. Also, an employee who is having or adopting a child with his or her partner but who is not the biological parent of the child could take unpaid leave for the birth of the child and to bond with the child.*

4. The Tribe shall offer and provide health benefits to the domestic partner of an employee to the same extent that such benefits are offered and provided to a spouse of an employee. The Tribe shall offer and provide health benefits to a dependent of an employee’s domestic partner to the same extent that such benefits are offered and provided a child of an employee.
5. To be eligible for benefits for a domestic partner, the Tribe may require an employee file a declaration of domestic partnership, signed by both partners under penalty of perjury, with the [human resources department / Tribal administration]. On such declaration, the employee shall agree to notify the Tribe promptly of any change in the status of the domestic partnership.
6. Benefits for an employee’s domestic partner and the dependents of an employee’s domestic partner shall terminate:
  - a. Upon the death of the employee in the same way that such benefits would terminate upon the death of a spouse.
  - b. Upon the termination of the domestic partnership in the same way

that such benefits would terminate upon divorce.

7. As used in this Section, the term “employees” refers to active and retired employees who are eligible for benefits pursuant to the laws or policies of the Tribe.
8. When the term “spouse” or “married” or “marriage” is used in other sections of the Tribe’s [employment] [code / ordinance / statute / policy], and documents, such terms shall be interpreted to include a domestic partner or domestic partnership. When the term “family” or “dependent” is used in other sections of the Tribe’s [employment] [code / ordinance / statute / policy], and documents, it shall be interpreted to include domestic partners and dependents of domestic partners. When the term “divorce” or “legal separation” is used in other sections of the Tribe’s [employment] [code / ordinance / statute / policy], and documents, it shall be interpreted to mean termination of a domestic partnership.

**Commentary:** *A more comprehensive amendment could read:*

**[citation]. Family and Medical Leave Definitions.** The Tribe’s [employment] [code / ordinance / statute / policy], [cite to definitions provision for the Tribe’s family medical leave law], is amended by [adding / amending] the followings sections, to read as follows:

1. “Family member” means an individual with any of the following relationships to the employee:
  - a. Spouse, and parents thereof;
  - b. Sons and daughters, and spouses thereof;
  - c. Parents, and spouses thereof;
  - d. Brothers and sisters, and spouses thereof;
  - e. Grandparents and grandchildren, and spouses thereof;
  - f. Domestic partner and parents thereof, including domestic partners of any individual in Subsections (b) through (e) of this definition; and
  - g. Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.
2. “Immediate relative” means an individual with any of the following relationships to the employee:

- a. Spouse, and parents thereof;
  - b. Sons and daughters, and spouses thereof;
  - c. Parents, and spouses thereof;
  - d. Brothers and sisters, and spouses thereof;
  - e. Grandparents and grandchildren, and spouses thereof;
  - f. Domestic partner and parents thereof, including domestic partners of any individual in Subsections (b) through (e) of this definition; and
  - g. Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.
3. "Parent" means:
- a. A biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor;
  - b. A person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian; or
  - c. A person who stands in loco parentis to the employee or stood in loco parentis to the employee when the employee was a minor or required someone to stand in loco parentis.
  - d. A parent of an employee's spouse or domestic partner.
4. "Son or daughter" means:
- a. A biological, adopted, step, or foster son or daughter of the employee;
  - b. A person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian;
  - c. A son or daughter of an employee's spouse or domestic partner; or
  - d. A person for whom the employee stands in loco parentis or stood in loco parentis when that individual was a minor or required someone to stand in loco parentis.
5. In loco parentis refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. Persons who are in loco parentis include those with day-to-day responsibilities to care for and financially support a child, or, in the case



of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

9. Nothing in this [code / ordinance / statute / policy] shall be construed to impose liability upon a domestic partner for the health or health expenses of his or her domestic partner or dependents of his or her domestic partner.

**Section 7. Requiring Equality by Contractors.** The Tribe's [employment / procurement] [code / ordinance / statute / policy], [cite to code / ordinance / statute / policy], is amended by adding one new section, to read as follows:

**[citation]. Equality by Contractors.** No Tribal entity may enter into any contract for the acquisition of goods or services in the amount of [one hundred thousand dollars (\$100,000)] or more with a contractor who, in the provision of benefits, discriminates between employees with spouses and employees with domestic partners, or discriminates between the domestic partners and spouses of those employees.

1. After taking all reasonable measures to find a contractor that complies with this Section as determined by the Tribal entity, the requirements of this Section may be waived under any of the following circumstances:
  - a. Whenever there is only one prospective contractor willing to enter into a specific contract with the Tribal entity.
  - b. If the contract is necessary to respond to an emergency, as determined by the Tribal entity, which endangers the health, welfare, or safety of the Tribe or its members, or the contract is necessary for the provision of essential services and no entity that complies with the requirements of this available.
  - c. Where the requirements of this Section violate, or are inconsistent, with the terms or conditions of a grant, subvention, or agreement, provided that a good faith attempt has been made by the entity to change the terms or conditions of any grant, subvention, or agreement to authorize application of this Section.
  - d. Where the contractor is providing wholesale or bulk water, power, or natural gas, the conveyance or transmission of the same, or ancillary services, as required for assuring reliable services in accordance with good utility practice, provided that the purchase of the same may not practically be accomplished through the standard competitive bidding procedures; and further provided that this exemption does not apply to contractors providing direct retail services to end users.

2. A contractor is not deemed to discriminate in the provision of benefits if:
  - a. There is a difference in the cost to provide a certain benefit to a domestic partner or spouse and the contractor permits the employee to pay any excess costs.
  - b. The contractor is unable to provide a certain benefit, despite taking reasonable measures to do so.
  - c. The contractor elects not to provide benefits to employees based on their marital status or domestic partnership status, or elects not to provide benefits to employees' spouses and to employees' domestic partners.

**Commentary:** Tribes may wish to provide an additional exception for contractors who do not provide benefits to employees' opposite-sex domestic partners.

3. Every contract subject to this Section shall contain a statement by which the contractor certifies that the contractor is in compliance with this Section.
4. For purposes of this Section, "contract" includes contracts with a cumulative amount of [add appropriate amount, such as one hundred thousand dollars (\$100,000)] or more per contractor in each fiscal year.
5. The Tribal entity or other contracting agency shall enforce this section pursuant to its existing enforcement powers.

**Section 8. Equality in Workplace Appearance, Grooming, and Dress Standards.** The Tribe's [employment] [code / ordinance / statute / policy], is amended by adding one new section, to read as follows:

**[citation]. Workplace Appearance, Grooming, and Dress Standards.** Tribal employees shall adhere to reasonable workplace appearance, grooming, and dress standards, provided that an employer shall be permitted to appear or dress consistently with the employee's gender identity or gender expression. Nothing in this section shall prohibit the Tribe from:

1. Requiring employees in a particular occupation to wear a uniform.
2. Requiring an employee to wear a costume while that employee is portraying a specific character or dramatic role.

**Commentary:** *Where a tribe has already adopted detailed workplace grooming and dress standards, this language could be added to supplement those standards. Note that while “[s]ome organizations adopt norms about the standard of dress appropriate for their business—for example, no jeans or shorts during work hours—and these rules should apply equally to all employees, regardless of gender, gender identity or expression.”<sup>176</sup>*

**Section 9. Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, employee or representative, which the Tribe expressly asserts.

**Section 10. 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 11. Effective Date.** This ordinance shall take effect [insert date or condition].

## CHAPTER 4: HOUSING, REAL PROPERTY TRANSACTIONS, PUBLIC ACCOMMODATIONS, AND PUBLIC SERVICES

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*“[S]exual orientation and gender identity-based discrimination in housing, health care, and public accommodations is alive and well. This is especially true for gay and transgender people of color.”<sup>177</sup>*

*“Housing discrimination against lesbian, gay, bisexual and transgender people takes a variety of forms. For example, couples have been discriminated against when shopping for a home. Others have been told they cannot put both partners' names on a homeowner's insurance policy, which is important to do if both partners share ownership of the home. And still other couples have been discriminated against when filing a claim as some insurance companies have attempted to refuse claims or cancel policies on the grounds that the owners are ‘unrelated.’”<sup>178</sup>*

*“[G]ay and transgender individuals may experience an outright refusal of services when attempting to access a host of public accommodations including restaurants, parks, hotels, libraries, buses, museums, and elsewhere simply because of their sexual orientation or gender identity.”<sup>179</sup>*

### APPROACHES TO PREVENTING DISCRIMINATION

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Our research has uncovered only limited tribal provisions specifically addressing Two Spirit / LGBT discrimination in the areas of housing, real property transactions, public accommodations, or public services. In one example, the model Tribal Housing Code developed by the Tribal Court Clearinghouse makes it a defense to an eviction that the landlord “is evicting the tenant because of his/her race, sex, sexual orientation, religion, age, marital status, family status, or because the tenant is disabled.”<sup>180</sup>

In another example, the Coquille Indian Housing Authority (CIHA) states that: “CIHA does not discriminate and does not do business with others who discriminate on the basis of race, color, national origin, sex, religion, age, familial status, disability, marital status, ancestry, sexual orientation, or gender identity in the employment or provision of services.”<sup>181</sup>

Various states, including but not limited to Oregon,<sup>182</sup> Washington,<sup>183</sup> Hawaii,<sup>184</sup> Connecticut,<sup>185</sup> and California,<sup>186</sup> as well as the District of Columbia,<sup>187</sup> have adopted laws that protecting against discrimination in the areas of housing, real property transactions, public accommodations, and/or public services.

In addition, new rule from the U.S. Department of Housing and Urban Development, aimed at addressing discrimination in federal housing programs, went into effect in January 2012. The rule includes three key changes to federal housing regulations. “First, it includes language that ensures same-sex couples and their children are recognized as families covered by HUD programs, including affordable housing assistance. Second it prohibits owners and operators of HUD-assisted housing, or housing whose financing is insured by HUD, from inquiring about the sexual orientation or gender identity of an applicant or basing a decision on their perceived sexual orientation or gender identity. Third it prohibits consideration of factors other than creditworthiness, including sexual orientation and gender identity, in the awarding of mortgage loans insured by the Federal Housing Administration.”<sup>188</sup>

## SAMPLE TRIBAL NONDISCRIMINATION IN HOUSING, REAL PROPERTY TRANSACTIONS, PUBLIC ACCOMMODATIONS, AND PUBLIC SERVICES ORDINANCE

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The sample Tribal Nondiscrimination in Housing, Real Property Transactions, Public Accommodations, and Public Services Ordinance provided below has been compiled from non-discrimination laws adopted by Oregon, Washington, Hawaii, Connecticut, and California, and the District of Columbia. This draft ordinance allows tribes with existing anti-discrimination laws relating to housing, property transactions, public accommodations, and/or public services to expand the scope of protection under those laws to promote equality based on sexual orientation and gender identity. For tribes that have not yet adopted such anti-discrimination laws, the laws referenced above offer examples of comprehensive statutory schemes.

### **Nondiscrimination in Housing, Real Property Transactions, Public Accommodations, and Public Services Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Nondiscrimination in Housing, Real Property Transactions, Public Accommodations, and Public Services Ordinance of the [insert name] Tribe.”

**Section 2. Policy.** It is the policy of the Tribe to secure for persons within the Tribe’s jurisdiction freedom from discrimination because of sexual orientation or gender identity in the areas of housing and real property transactions, public accommodations, and public services.

**Section 3. Purpose.** The purpose of this ordinance is to promote equality and to prohibit discrimination on the basis of sexual orientation and gender identity in the areas of housing and real property transactions, public accommodations, and public services.

**Section 4. Addition of Definitions.** The Tribe’s [property / housing] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding four new sections, to read as follows:

**[citation].** “Gender identity” refers to a person’s sense of being female, male, neither or some combination of both. When one’s gender identity and assigned sex at birth are not congruent, the individual may identify as transgender, transsexual, or genderqueer.

**[citation].** “Place of public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.

**[citation].** “Public service” means any public facility, department, agency, board or commission, owned, operated or managed by or on behalf of the Tribe, or any entity or subdivision thereof.

**[citation].** “Sexual orientation” means a person’s actual or perceived heterosexuality, homosexuality, or bisexuality.

**Section 5. Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity in Housing and Real Property Transactions.** The Tribe’s [real property / housing] [code / ordinance / statute / policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding the one new section, to read as follows:

**[citation]. Prohibiting Unfair Discriminatory Practices.** It is an unfair discriminatory practice for an owner, lessee, sublessee, assignee, broker, managing agent, or other person having the right to sell, rent or lease any real property or

housing accommodation, or any financial institution to whom application is made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair, or maintenance of any real property or housing accommodation, or any agent or employee or any of these:

1. To discriminate against any person or group of persons because of sexual orientation or gender identity in the terms, conditions, or privileges of the sale, rental, or lease of any real property or housing accommodation or in the furnishing of facilities or services in connection therewith.
2. To refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property or housing accommodation because of sexual orientation or gender identity.
3. To make or to cause to be made any written or oral inquiry concerning the sexual orientation or gender identity of any person seeking to purchase, rent, or lease any real property or housing accommodation.
4. To directly or indirectly advertise, or in any other manner indicate or publicize that the purchase, rental, lease, assignment, or sublease of any real property or housing accommodation by persons of any particular sexual orientation or gender identity is unwelcome, objectionable, not acceptable, or not solicited.
5. To discriminate against the lessee or purchaser of any real property or housing accommodation, or against any prospective lessee or purchaser of the property or housing, because of the sexual orientation or gender identity of persons who may from time to time be present in or on the lessee's or owner's premises, at the invitation of the lessee or owner, as friends, guests, visitors, relatives, or in any similar capacity.

**Section 6. Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity in Public Accommodations and Public Services.** The Tribe's [non-discrimination / public accommodations / public services] [code / ordinance / statute / policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding one new section, to read as follows:

**[citation]. Full and Equal Enjoyment of Public Accommodations and Public Services.** It is an unfair discriminatory practice to:

1. Deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of his or her sexual orientation or

gender identity.

2. For a place of public accommodation to directly or indirectly advertise or in any other manner indicate or publicize that the patronage of persons of any particular sexual orientation or gender identity is unwelcome, objectionable, not acceptable, or not solicited.
3. Discriminate against any person in the access to, admission to, full utilization of, or benefit from any public service because of his or her sexual orientation or gender identity.

**Commentary:** *A tribe wishing to limit these requirements as to any of these protections may add exceptions, such as:*

This Section shall not apply to:

1. Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose.
2. The rental or leasing to individuals of less than six rooms within a single housing accommodation by the occupant or owner of such housing accommodation if the occupant or owner or members of that person's family reside therein.



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## CHAPTER 5: EDUCATION

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Bullying of Two Spirit / LGBT students (and students perceived to be Two Spirit / LGBT or who associate with Two Spirit / LGBT students) is widespread—and its impacts are significant. For example, the Gay, Lesbian & Straight Education Network’s *2011 National School Climate* “found that the majority of LGBT students are faced with many obstacles in school affecting their academic performance and personal well-being. Results indicated that 8 out of 10 LGBT students (81.9%) experienced harassment at school in the past year because of their sexual orientation, three fifths (63.5%) felt unsafe at school because of their sexual orientation and nearly a third (29.8%) skipped a day of school in the past month because of safety concerns.”<sup>189</sup> The situation is worse for transgender students, of which 80% reported feeling unsafe at school because of their gender expression.<sup>190</sup>

Bullying in schools has historically included actions shown to be motivated by a student’s actual or perceived race, color, religion, national origin, ancestry or ethnicity, sexual orientation, socioeconomic status, age, physical, mental, emotional, or learning disability, gender, gender identity and expression, obesity, or other distinguishing personal characteristics, or based on association with any person identified in any of the above categories. Legislation prohibiting discrimination, bullying, and harassment in schools and universities should therefore explicitly protect students based on their sexual orientation, gender identity, and association with Two Spirit / LGBT people.<sup>191</sup>

Eighteen states and the District of Columbia have adopted education-related laws covering sexual orientation and gender identity.<sup>192</sup> We did not find any tribal laws specifically addressing LGBT educational issues.

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### SAMPLE TRIBAL EDUCATION EQUALITY ORDINANCE

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The sample Tribal Education Equality Ordinance provided below has been compiled from the laws of Oregon,<sup>193</sup> California,<sup>194</sup> Connecticut,<sup>195</sup> and New Hampshire,<sup>196</sup> and school board policies for Vancouver,<sup>197</sup> Burnaby,<sup>198</sup> and Southeast Kootenay.<sup>199</sup>

### **Education Equality Ordinance**

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

**Section 2. Declaration and Policy.**

A. The [Tribal Council / Business Committee] recognizes and values the diversity found within the educational institutions of the [insert name of Tribe] (Tribe), and believes that each individual, whether male or female, contributes to the strength of the Tribe’s culture.

B. The [Tribal Council / Business Committee] finds that:

1. A safe and civil school environment is necessary for students to learn and achieve.
2. One of the Tribe’s highest priorities is to protect our children from physical, emotional, and psychological violence, including in the educational institutions within the Tribe’s jurisdiction.
3. Two Spirit, gay, lesbian, bisexual, and transgender (collectively referred to herein as LGBT) students and other school personnel face a unique set of challenges.
4. All students and school personnel should be protected against discrimination, bullying, and harassment, including discrimination, bullying, and harassment based on actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups.
5. Promoting equality in education is essential to the political integrity, economic security, and health and welfare of the Tribe.

C. It is the policy of the Tribe to promote, for each student enrolled in an educational institution within the Tribe’s jurisdiction, a safe and caring learning environment that fosters and maintains respectful and responsible behaviors.

**Section 3. Purpose.** The purpose of this ordinance is to prohibit discrimination, harassment, and bullying, including on the basis of actual or perceived sexual orientation, gender identity, or association with LGBT individuals in educational institutions.

**Section 4. Definitions.** As used in this ordinance:

A. “Bullying” means any act directed at a student or students that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation, or at any official school bus stop, and which does or can reasonably be predicted to:

1. Place the student or students in reasonable fear of harm to the student's or students' person or property;
2. Cause a substantially detrimental effect on the student's or students' physical or mental health;
3. Substantially interfere with the student's or students' educational benefits, opportunities, or performance;
4. Substantially interfere with the student's or students' ability to participate in or benefit from the services, activities, or privileges provided by a school;
5. Create a hostile educational environment; or
6. Substantially disrupt the orderly operation of the school.

"Bullying" shall include actions motivated by an imbalance of power based on a student's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the student's association with another person and based on the other person's characteristics, behaviors, or beliefs.

B. "Cyberbullying" the use of electronic communication devices to harass, intimidate or bully.

C. "Discrimination" means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation. Discrimination does not include enforcement of an otherwise valid dress code or policy, as long as the code or policy provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual.

D. "Educational institution" means a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery or pre-school system, and a business, nursing, professional, secretarial, technical, or vocational school.

E. "Electronic devices" include but are not limited to telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites.

F. "Gender Identity" refers to a person's sense of being female, male, neither or some combination of both. When one's gender identity and assigned sex at birth are not congruent, the individual may identify as transgender, transsexual, or genderqueer.

G. "LGBT" means Two Spirit, gay, lesbian, bisexual, or transgender.

H. "Perpetrator" means a person who engages in bullying or cyberbullying.

I. “School personnel” means persons employed by, on contract with, agents of, or who volunteer in an educational institution, including but not limited to administrators, teachers, coaches, guidance counselors, social workers, counselors, psychologists, nurses, cafeteria workers, custodians, bus drivers, school resource officers, and security guards.

J. “School property” means all real property and grounds, equipment, and vehicles used for school purposes.

K. “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, or bisexuality.

L. “Victim” means a student against whom bullying or cyberbullying has been perpetrated.

### **Section 5. Prohibiting Discrimination in Education.**

A. Each student enrolled in an educational institution within the Tribe’s jurisdiction shall have, and shall be advised by the appropriate school authorities of the right to have, an equal opportunity to be admitted to and participate in the activities, programs, and courses of study offered in such school, without discrimination on the basis of actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups.

B. Nothing in this ordinance shall prohibit an educational institution from using academic qualifications or achievements as criteria for admission or requiring from applicants information which relates to academic qualifications or achievements.

**Section 7. Bullying Prevention.** Bullying and cyberbullying on the basis of actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups is prohibited in all educational institutions.

A. No student shall be subjected to bullying or cyberbullying:

1. During any school-sponsored education program or activity;
2. While in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities;
3. Through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment; or
4. That occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a student’s educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.

B. This Section shall not be interpreted to prevent a victim from seeking redress under any other available civil or criminal law.

C. Nothing in this Section is intended to infringe upon any right to exercise free expression or the free exercise of religion or religiously based views to the extent protected under applicable law.

**Section 8. Policies Required.** Within 180 days of the adoption of this ordinance, all educational institutions within the Tribe's jurisdiction shall adopt written policies prohibiting discrimination, harassment, bullying, and cyberbullying on the basis of sexual orientation, gender identity, or association with LGBT individuals or groups. The policies shall, at a minimum:

A. Apply to all school personnel at the educational institution.

B. Be widely distributed to promote understanding and compliance, including, at a minimum, distribution to school personnel, students, and parents and guardians on an annual basis.

C. Require school personnel to provide educational services in a manner that respects the dignity and rights of all persons, without prejudice as to actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups.

D. Include a formal grievance procedure that allows for confidential complaints and neutral third-party investigations.

E. Be updated every two years and filed with the [Tribal Council / Business Committee / Tribal Administration] after being updated.

F. Be developed, to the greatest extent practicable, with the involvement of students, parents, school personnel, Tribal leaders, elders, community representatives, and local law enforcement agencies.

**Section 9. 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 10. 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 11. 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 12. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]

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## CHAPTER 6: HEALTH CARE; END OF LIFE

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*“[R]ights concerning the death of a spouse/partner and the benefits available to a widower are ‘critically important,’ especially for same-sex couples who may or may not be protected pursuant to state [or tribal] law.”<sup>200</sup>*

The privileges, immunities, rights, benefits and responsibilities granted to or imposed on members of same-sex couples at the end of life vary by jurisdiction. Some of the critical end-of-life issues facing same-sex couples include:

- Living will / advance directive;<sup>201</sup>
- The right to make medical decisions (including the right of hospital visitation);<sup>202</sup>
- Priority in claiming human remains;
- Priority for a guardianship/conservatorship;<sup>203</sup>
- The right to make anatomical gifts (organ donation);<sup>204</sup>
- Inheritance rights during probate;<sup>205</sup>
- The right to bring a wrongful death action, receive death benefits and crime victim’s compensation benefits, and/or file worker’s compensation death claims;<sup>206</sup> and
- Rights of spousal allowance, homestead allowance, and income for the surviving spouse (*i.e.*, life insurance, pension benefits, social security benefits, etc.).<sup>207</sup>

Some jurisdictions, such as Washington and Oregon, have adopted broad domestic partnership laws that treat domestic partners like spouses would be treated for various purposes under the state’s laws.<sup>208</sup> Such statutory schemes affect end of life laws in several ways. For example, a decedent’s domestic partner would be considered the decedent’s “surviving spouse” for the purpose of intestate succession. As the surviving spouse, the surviving partner would take priority over the decedent’s other family (other than the decedent’s issue) in receiving a portion or all of the decedent’s intestate estate.<sup>209</sup> In another example, a domestic partner would be protected as a spouse to make decisions about whether to continue or cease life-sustaining treatment (unless a guardian or other health care representative has been appointed).<sup>210</sup>

Other jurisdictions, such as Wisconsin and California, have adopted specific code revisions to extend to domestic partners the end of life privileges, immunities, rights, benefits, and responsibilities that are granted to or imposed on spouses.

## SAMPLE TRIBAL HEALTH CARE AND END-OF-LIFE EQUALITY ORDINANCE

The sample Tribal Health Care and End-of-Life Equality Ordinance provided below has is based primarily on the Oregon Family Fairness Act<sup>211</sup> and the Revised Code of Washington.<sup>212</sup> This draft ordinance allows tribes with existing end-of-life laws (probate, guardian and conservator, advance directive, etc.)—but without marriage or domestic partnership laws extending end-of-life rights to same-sex partners—to expand end-of-life protections for same-sex partners and their families through one broad ordinance.

Tribes could also consider amending the language of each individual ordinance or policy that provides health care or end-of-life related rights, benefits, or protections to a spouse or based on a marriage to specifically extend such rights, benefits, or protections to same-sex partners. For example, Wisconsin<sup>213</sup> and California<sup>214</sup> laws specifically address domestic partner rights.

### **Health Care and End-of-Life Equality Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Health Care and End-of-Life Equality Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.** It is the policy of the Tribe that for purposes of the health care decision-making and end-of-life privileges, immunities, rights, benefits and responsibilities that are granted or imposed under Tribal law, domestic partners shall be treated the same as married spouses.

**Section 3. Purpose.** The purpose of this ordinance is to extend to domestic partners the same health care decision-making and end-of-life privileges, immunities, rights, benefits, and responsibilities that are granted to or imposed on spouses under Tribal law.

**Section 4. Definitions.** As used in this ordinance:

A. “Domestic partner” means a person joined in a valid domestic partnership that has not been

terminated, except by the death of one partner.

B. “Domestic partnership” means a legal relationship, entered into in person between two eligible persons of the same sex, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

C. “End of life” means related to probate and inheritance, medical decision-making, hospital visitation, guardianships, conservatorships; and rights to:

1. Claim human remains;
2. Make anatomical gifts;
3. Bring a wrongful death action;
4. Receive death benefits;
5. Receive crime victim’s compensation benefits;
6. File worker’s compensation death claims; and
7. Surviving spouse benefits, including but not limited to rights of spousal allowance, homestead allowance, and income for the surviving spouse (*i.e.*, life insurance, pension benefits, social security benefits, etc.).

**Section 5. Health Care and End of Life Privileges, Immunities, Rights, Benefits, and Responsibilities Granted to and Imposed on Domestic Partners.**

A. Any privilege, immunity, right, benefit, or responsibility granted or imposed by the Tribe’s health care and end-of life laws, including but not limited to the [insert name and reference to the Tribe’s probate, guardianship and conservatorship, etc. codes], to an individual because the individual is or was a spouse, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership or because the individual is or was, based on a domestic partnership, related in a specified way to another individual.

B. For the purposes of this ordinance:

1. The terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to domestic partnerships or domestic partners as to marital relationships and married persons.
2. References to dissolution of marriage shall apply equally to domestic partnerships that have been terminated, dissolved, or invalidated.



3. Where necessary to implement this ordinance, gender-specific terms, such as husband and wife, used in any statute, rule, or other law, shall be construed to be gender neutral and applicable to individuals in domestic partnerships.

**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].]

## CHAPTER 7: BIAS-MOTIVATED (HATE) CRIMES

*“Laws — especially criminal laws — are an expression of society’s values. Hate crime laws both express the social value of equality and foster the development of those values.”<sup>215</sup>*

*“Hate crimes are violent manifestations of intolerance and have a deep impact on not only the immediate victim but the group with which that victim identifies him or herself. They affect community cohesion and social stability. A vigorous response is therefore, important both for individual and communal security.”<sup>216</sup>*

Generally, hate crimes, or bias-motivated crimes, are offenses that are motivated by hatred or bias against a victim based on his or her race, religion, sexual orientation, handicap, ethnicity, national origin, or other protected characteristic.<sup>217</sup> “The targeted activity—the selection of a victim—is an integral part of the underlying crime.”<sup>218</sup> “It is this motive that makes hate crimes different from other crimes.”<sup>219</sup>

“Hate crimes differ from ordinary crimes not only because of the motivation of the offender, but also because of the impact on the victim.”<sup>220</sup> “Hate crimes are designed to intimidate the victim and the victim’s community on the basis of their personal characteristics. Such crimes send a message to the victim that they are not welcome; they have the effect of denying the victim’s right to full participation in society. They also send a message to members of the community sharing the characteristic that they also do not belong, and could equally be a target.”<sup>221</sup> A hate or bias-motivated crime thus “victimizes not only the immediate target but every member of the group that the immediate target represents.”<sup>222</sup>

“Hate crimes, therefore, can damage the fabric of society and fragment communities.”<sup>223</sup> “A bias-motivated offense can cause a broad ripple of discomfiture among members of a targeted group, and a violent hate crime can act like a virus, quickly spreading feelings of terror and loathing across an entire community. Apart from their psychological impacts, violent hate crimes can create tides of retaliation and counterretaliation.”<sup>224</sup>

### “Bias-Motivated Crimes” vs. “Hate Crimes”

Hate crimes are also commonly referred to as “bias-motivated crimes.” Both terms are used in this publication. However, the model tribal law provisions set forth herein use the term “bias-motivated crimes” to expand coverage to include crimes that evidence a bias—if not hate—against members of a protected group.

### **Characteristics of Bias-Motivated Crimes**

- “Like other crimes, bias-motivated criminal acts have specific characteristics.”<sup>225</sup> “[T]he majority of hate crimes are committed by young white males against persons of other races,<sup>226</sup> and the most common crimes involve simple assault or intimidation... [A]pproximately 60 percent of the hate crime incidents were motivated by racial bias; 18 percent by religious bias; 12 percent by a bias against sexual orientation; and 10 percent by a bias against ethnicity or national origin.”<sup>227</sup>
- “Most crimes against persons typically are committed by a family member or acquaintance. But when it comes to hate crimes, an attack is more likely to be committed by a stranger.”<sup>228</sup> “Among hate crime offenders, juveniles and young people are disproportionately represented... [A]bout half of all hate crimes are estimated to be committed by people younger than 20. According to a study funded by the Office of Juvenile Justice and Delinquency Prevention, an estimated 17 to 26 percent of all hate crime incidents recorded by law enforcement agencies are committed by juveniles.”<sup>229</sup>
- “Most hate crimes are committed not by members of an organized hate group but by individual citizens. Some perpetrators resent the growing economic power of a particular racial or ethnic group and engage in “scapegoating”; others react to a perceived threat to the safety and property value of their neighborhood. Still other offenders include “thrill seekers”—those who randomly target interchangeable representatives of minority groups for harassment and violence, and “mission offenders”—those who believe they are on a mission to rid the world of some perceived evil. This last group accounts for a tiny percentage of bias-motivated offenders. The majority of offenders—and passive observers—are merely individuals who believe racial and ethnic stereotypes and act on spur-of-the-moment impulses. Frequently alcohol or drug use is a factor in the commission of hate crimes.”<sup>230</sup>
- “Perhaps the most salient characteristic of bias crimes is that they are more likely to involve a physical assault... Because they are more likely to involve assaults, hate crimes also are more likely to involve physical injuries. Offenders often use what hate crime experts call ‘imprecise weapons of opportunity,’ such as bricks, bats, clubs, tree limbs, and box cutters. As a result, hate crimes tend to be excessively brutal and result in more serious injuries than common criminal attacks.”<sup>231</sup>

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### IMPORTANCE OF LEGISLATION ADDRESSING BIAS-MOTIVATED CRIME

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*“Hate crime laws are important. By explicitly condemning bias motives, they send a message to offenders that a just and humane society will not tolerate such behavior. By recognizing the harm done to victims, they convey to individual victims and to their communities the understanding that the criminal justice system serves to protect them.”<sup>232</sup>*

Bias-motivated crimes “have the potential to divide societies, and to create cycles of violence and retaliation. For this reason, a vigorous response to such crimes is necessary.”<sup>233</sup> “Codifying the social condemnation of hate crimes into law is important to affected communities, can help build trust in the criminal justice system, and thus can repair social fissures.”<sup>234</sup>

Moreover, “[i]f hate crimes are treated like other crimes and are not recognized as a special category they are often not dealt with properly. This can manifest itself in ways such as: investigators disbelieving the victim or failing to properly investigate allegations of bias motive; prosecutors minimizing the offence when choosing charges; and courts failing to apply their powers to increase sentences to reflect the motives of the perpetrator.”<sup>235</sup> In contrast, if the bias motive is considered in the prosecution of hate crimes, “such public acknowledgement reassures the victim that his or her experience has been fully recognized. This in turn can inspire trust in other members of the community that hate crimes will not go unpunished.”<sup>236</sup>

Finally, the process of developing and adopting bias-motivated crime laws can have significant practical benefits for a jurisdiction. First, the legislative and community discussions involved in the proposal and adoption of bias-motivated crime laws “serves to focus attention and raise awareness of the extent and nature of the crimes. The process of passing legislation can thereby improve awareness of and responses to hate crime.”<sup>237</sup> Then, once legislation has been adopted, training for police, prosecutors, and judges on the implementation of bias-motivated crime laws “increases the skills and knowledge. This results in improved criminal justice responses to hate crimes.”<sup>238</sup> Specific bias-motivated crime laws also make “data collection more effective, which gives improved intelligence and policing information, enabling resources to be properly allocated.”<sup>239</sup>

In addition, “[w]hen hate crime cases are identified, the nature of the problem and the effectiveness of the response become clearer, allowing training and resources to be allocated to those areas most in need. An improved criminal justice response raises the confidence of affected communities. This leads to information and cooperation from communities who may otherwise be

wary of the police. This leads to more investigations being resolved, not only in relation to hate crime but also into other matters in which police require community assistance. Thus, legislation increases awareness and enables better scrutiny, which in turn leads to more effective implementation and improved police-community relations.”<sup>240</sup>

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### CHALLENGES TO LEGISLATION ADDRESSING BIAS-MOTIVATED CRIME

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Challenges exist to adopting and enforcing effective bias-motivated crime legislation. For example, some commentators believe that “criminal acts motivated by bias can easily be confused with forms of expression protected by the U.S. Constitution”<sup>241</sup> or the Indian Civil Rights Act. Therefore, the most common challenges to bias-motivated crime laws have been based on the argument that such laws “violate the first amendment of the U.S. Constitution, which restricts governments’ power to make laws infringing upon an individual’s freedom of speech and expression. Opponents of hate crime laws argue that punishing an offender more harshly when that person commits a crime because of a bias against a class of persons penalizes his or her thoughts and violates the first amendment.”<sup>242</sup>

In addition, enforcement is key to successful hate crime legislation. “Even the most comprehensive and coherent law will fail to achieve the aims of the legislature if it is not enforced. Once a hate crime law is enacted, its use should be monitored and assessed.”<sup>243</sup> Finally, an increased sentence for a hate crime only comes at the end of a long sequence of events. In order for an offender to be subject to a hate crime law, a victim must be willing to report the crime, the police must investigate it carefully, the prosecutor must file a hate crime charge, and the court must convict. Any misstep in the sequence means a lost opportunity to combat hate crime.”<sup>244</sup>

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### BIAS-MOTIVATED CRIMES AND THE LAW

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Our research has not uncovered any tribal laws specifically addressing hate crimes. However, “[a]ll but five states<sup>245</sup> (Arkansas, Georgia, Indiana, South Carolina, and Wyoming) have laws addressing the scourge of hate crimes.”<sup>246</sup> In general, the jurisdictions that have adopted hate crime legislation have used four different types of statutes that address bias-motivated crimes: substantive offenses; penalty enhancements; prohibiting specific actions; and bias-motivated crime training and reporting requirements.<sup>247</sup>

Model tribal provisions are provided below for each type of statute. Because we have not found any tribal bias-motivated crime laws, the model provisions provide protection for a range of characteristics—not just sexual orientation and gender identity. In addition, because drafting a hate crime law or revising an existing one involves a series of choices for tribal lawmakers, the model provisions include extensive commentary that discusses key policy choices.

## PART A: CRIMINAL OFFENSES WITH BIAS MOTIVE

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Some jurisdictions have chosen to prohibit general behaviors motivated by bias. “These statutes punish motive and criminal conduct as one offense.”<sup>248</sup> There are thus two elements to these statutes: a criminal offense; and a bias motive.<sup>249</sup> First, the crime involves an act that would constitute an offense under ordinary criminal law, such as intimidation, threats, property damage, assault, murder, or other criminal offense.<sup>250</sup>

Second, the criminal offense must have been committed with a bias motive. “This means that the perpetrator intentionally chose the *target* of the crime because of some *protected characteristic*. The *target* may be one or more people, or it may be property associated with a group that shares a particular characteristic. A *protected characteristic* is a characteristic shared by a group, such as “race”, language, religion, ethnicity, nationality, or any other similar common factor.”<sup>251</sup>

Jurisdictions vary in the types of characteristics they protect.<sup>252</sup> For example, Oregon law recognizes hate crimes motivated by the victim’s race, color, religion, national origin, and sexual orientation, including gender identity.<sup>253</sup> Washington law criminalizes “malicious harassment” and violence against individuals because of their sexual orientation (including gender identity or expression, which is included in the definition of sexual orientation).<sup>254</sup> California’s hate crimes statute protects against crimes motivated by gender, and defines “gender” as “the victim’s actual sex or the defendant’s perception of the victim’s sex, and includes the defendant’s perception of the victim’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim’s sex at birth.”<sup>255</sup>

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### SAMPLE TRIBAL ORDINANCE PROVISION

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The following sample hate crime provision prohibiting general behaviors motivated by bias, which could be added to tribal criminal codes, is based on model hate crime legislation developed by the Anti-Defamation League,<sup>256</sup> as well as the laws of Oregon,<sup>257</sup> California,<sup>258</sup> and Washington.<sup>259</sup>

**Section x. Definitions.** For purposes of this Section:

A. “Association with a person or group with these actual or perceived characteristics” includes advocacy for, identification with, or being on the ground owned or rented by, or adjacent to, a community center, educational facility, family, individual, office, meeting hall, place of worship, private institution, public agency, library, or other entity, group, or person that has, or is identified with people who have, one or more of the characteristics protected in this Section.

B. “Bias-motivated crime” means a crime described in this Section that is intentionally committed, in whole or in part, because of the offender’s perception of the race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim, or the victim’s association with a person or group with these actual or perceived characteristics.

**Commentary:** *This is a fairly comprehensive list of protected characteristics. Tribes could consider adding to or deleting characteristics from this list. “The choice of protected characteristics is one of the most important aspects of hate crime laws. There is no precise answer as to which characteristics should be included, but they are usually ones that are apparent or noticeable to others and thus more easily targeted by offenders.”<sup>260</sup>*

C. “Gender identity” refers to a person’s sense of being female, male, neither or some combination of both. When one’s gender identity and assigned sex at birth are not congruent, the individual may identify as transgender, transsexual, or genderqueer.

D. “Homeless status” means that a person:

1. Lacks a fixed, regular, and adequate nighttime residence; or
2. Has a primary nighttime residence that is:
  - a. A supervised publicly or privately operated shelter designed to provide

temporary living accommodations; or

- b. A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

E. “In whole or in part because of” means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic.

F. “Mental or physical disability” means that a person suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, and has one or more physical or mental limitations that restrict his or her ability to perform the normal activities of daily living.

G. “Nation origin” includes citizenship, country of origin, and tribal affiliation.

H. “Property” means any tangible personal property or real property.

I. “Reasonable person” means a reasonable person who is a member of a victim’s race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, economic or social status, or citizenship.

J. “Sexual orientation” means a person’s actual or perceived heterosexuality, homosexuality, or bisexuality.

K. “Threaten” means to communicate, directly or indirectly, the intent to:

1. Cause bodily injury immediately or in the future to the person threatened or to any other person; or
2. Cause physical damage immediately or in the future to the property of a person threatened or that of any other person.

L. “Victim” includes, but is not limited to, a person, family, group, individual, community center, educational facility, entity, office, meeting hall, place of worship, private institution, public agency, library, or other victim or intended victim of the offense.

#### **Section xx. Bias-Motivated Crimes.**

A. A person commits a bias-motivated crime if he or she intentionally commits one of the following acts, in whole or in part, because of his or her perception of the race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical



disability, age, homeless status, or economic or social status of the victim, or the victim's association with a person or group with these actual or perceived characteristics.

**Commentary:** *Tribal legislators will need to determine how “motive” should be defined in the law. “In the popular conception of a hate crime, the offender acts out of hatred or hostility toward a particular characteristic of the victim, such as the victim’s skin colour or ethnic or national origin or religion... This is not, however, a requirement of all hate crime laws. Some hate crime laws only require that the offender intentionally chose the victim because of some protected characteristic of that victim.”<sup>261</sup>*

*The sample language above addresses crimes that are intentionally committed in whole or in part “because of” the offender’s perception of the victim’s protected characteristic. This approach is broader because it encompasses those offenders who may harbor no hostility toward their victims but nevertheless selected them based on prejudices or stereotyped information about victim vulnerabilities. “For several reasons, a discriminatory selection law is both easier to apply in practice and may do a better job of addressing the kind of harm that hate crime laws are intended to prevent. First, a discriminatory selection law does not require that hate be proven as an element of the offence. When a hate crime law requires ‘hostility,’ it requires law enforcement to make an assessment of an offender’s mental state — an exercise that may be difficult and one for which most law enforcement are not trained.”<sup>262</sup>*

1. Causes physical injury to the victim or another person;
2. Subjects another to offensive physical contact;
3. Causes physical damage to or destruction of the property of the victim or another person; or
4. Tamper or interferes with property, having no right to do so nor reasonable ground to believe that the person has such right, with the intent to cause substantial inconvenience;
5. Threatens a specific person or group of persons, and places that person or members of the group of persons in reasonable fear of harm to person or property.
  - a. The fear must be a fear that a reasonable person would have under all the circumstances.
  - b. Words alone do not constitute a bias-motivated crime unless the context or circumstances surrounding the words indicate the words are a threat.
  - c. Threatening words do not constitute a bias-motivated crime if it is apparent to the victim that the person does not have the ability to carry out the threat.

**Commentary:** *Another option would be to insert specific tribal code provisions for criminal trespass, criminal mischief, harassment, menacing, intimidation, assault, battery and other appropriate statutorily proscribed criminal conduct.*

- B. It is not a defense to a bias-motivated crime that the accused was mistaken that the victim:
1. Was of or a member of a certain race, color, religion, national origin, gender, sexual orientation, labor organization, marital status, age, homeless status, or economic or social status;
  2. Has a certain mental or physical disability;
  3. Held certain political affiliation or beliefs;
  4. Participated in activities in or on behalf of a labor organization or against a labor organization; or
  5. Was associated with a person or group with these actual or perceived characteristics.
- C. Evidence of expressions or associations of the accused may not be introduced as substantive evidence at trial unless the evidence specifically relates to the crime charged. Nothing in this chapter shall affect the rules of evidence governing impeachment of a witness.

**Commentary:** *Tribes may wish to provide examples of permissible and impermissible uses of this evidence.*

- D. A bias-motivated crime under this Section is a \_\_\_\_\_ misdemeanor/ felony.

**Commentary:** *The degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense.*

- E. Every person who commits another crime during the commission of a bias-motivated Crime may be punished and prosecuted for the other crime separately.
- F. The penalties provided in this Section for a bias-motivated crime do not preclude the victim from seeking any other remedies otherwise available under law.

**Commentary:** *One of the biggest policy decisions for lawmakers seeking to adopt bias-motivated crime legislation is determining whether the law should create a new substantive offense, or operate as a penalty enhancement for existing crimes, or do both. “There are certain advantages to enacting a law making hate crime a substantive offence. Because part of the importance of hate crime law — for both the individual victim and society at large — is the symbolic value of labeling the offence, a substantive hate crime law explicitly condemns the prohibited bias motive. When hate crimes are enacted as substantive offences, the crime usually has greater visibility and hate crime data is easier to collect. Thus, a substantive hate crime law fulfills the expressive function of criminal law.”<sup>263</sup>*

*However, “substantive offences pose challenges as well. A substantive hate crime offence requires motive to be proved in order for the accused to be convicted. Prosecutors may be reluctant to press charges regarding a substantive offence if they believe it will be harder to prove.”<sup>264</sup> “Training for prosecutors and investigators as to the indicators of motive is an important aspect of overcoming such problems.”<sup>265</sup>*

## PART B: PROHIBITING SPECIFIC ACTIONS

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Some jurisdictions prohibit specific intimidating actions. For example, California, Florida, and Ohio “have passed laws prohibiting specific activity at specific places, such as vandalism and intentional disturbances at places of worship.”<sup>266</sup> In addition, “Florida and the District of Columbia have banned acts such as burning a cross or placing a swastika or other symbol on another’s property with the intent to intimidate.”<sup>267</sup>

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### SAMPLE TRIBAL ORDINANCE PROVISION

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The following sample provision is based on model hate crime legislation developed by the Anti-Defamation League<sup>268</sup> and Oregon law.<sup>269</sup>

**Section x. Institutional Vandalism.**

- A. A person commits the crime of institutional vandalism by knowingly abusing:
1. Any Tribal cultural center, long house, community building, sacred site, pow wow grounds, or place used for Tribal community, cultural, traditional, historical, or ceremonial purposes;
  2. Any church, synagogue, or other building, structure, or place used for religious worship or other religious purpose;
  3. Any cemetery, mortuary, or other facility used for the purpose of burial or memorializing the dead;
  4. Any school, educational facility, or community center;
  5. A Tribal or public monument or structure;
  6. The Tribal flag;
  7. The grounds adjacent to, and owned or rented by, any institution, facility, building, structure, or place described in Subsections (1), (2), (3), or (4) above; or

8. Any personal property contained in any institution, facility, building, structure, or place described in Subsections (1), (2), (3), or (4) above.

B. For purposes of this Section, “abusing” means to defacing, damaging, defiling, or otherwise physically mistreating in a manner likely to outrage public sensibilities.

C. Institutional vandalism is punishable as follows:

1. Institutional vandalism is a [describe level of offense or punishment, based on the Tribe’s penalty classification system] if the person does any act described in Subsection (A) that causes damage to, or loss of, the property of another.
2. Institutional vandalism is a [describe level of offense or punishment, based on the Tribe’s penalty classification system] if the person does any act described in Subsection (A) that which causes damage to, or loss of, the property of another in an amount in excess of five hundred dollars (\$500).
3. Institutional vandalism is a [describe level of offense or punishment, based on the Tribe’s penalty classification system]if the person does any act described in Subsection (A) that causes damage to, or loss of, the property of another in an amount in excess of one thousand dollars (\$1,000).
4. Institutional vandalism is a [describe level of offense or punishment, based on the Tribe’s penalty classification system]if the person does any act described in Subsection (A) that causes damage to, or loss of, the property of another in an amount in excess of five thousand dollars (\$5,000).
5. In determining the amount of damage to, or loss of, property, damage includes the cost of repair or replacement of the property that was damaged or lost.

D. Irrespective of any criminal prosecution or result thereof, any person or entity incurring injury to his or her person or damage or loss to his or her property as a result of conduct in violation of Subsection (A) of this section shall have a civil action against any and all persons who have violated Subsection (A).

Upon prevailing in such civil action, the plaintiff may recover:

1. Both special and general damages, including damages for emotional distress;
2. Punitive damages; and/or
3. Reasonable attorney fees and costs.

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## PART C: ENHANCED PENALTIES

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Some jurisdictions provide enhanced penalties for criminal acts motivated by bias.<sup>270</sup> “In Wisconsin, for example, State law provides that the maximum penalty for an offense is enhanced if the defendant intentionally selects the person against whom a crime is committed because of the ‘race, religion, color, disability, sexual orientation, national origin, or ancestry of that person.’”<sup>271</sup> Similarly, in both Oregon and Arizona, evidence of a bias-related motive is an “aggravating factor” allowing judges to depart from sentencing guidelines and impose lengthier terms of imprisonment.<sup>272</sup>

NOTE: In state and federal courts, sentencing enhancements based on a bias-related motive must be pled in the indictment and proved beyond a reasonable doubt to the trier of fact, unless admitted by the defendant in a guilty plea.

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### SAMPLE TRIBAL ORDINANCE PROVISION

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The following sample penalty enhancement language, which could be added to tribal criminal codes, is based on Florida<sup>273</sup> and Wisconsin law.<sup>274</sup>

**Section x. Penalty Enhancements for Certain Offenses.****A. Definitions.** For purposes of this Section:

1. “Association with a person or group with these actual or perceived characteristics” includes advocacy for, identification with, or being on the ground owned or rented by, or adjacent to a community center, educational facility, family, individual, office, meeting hall, place of worship, private institution, public agency, library, or other entity, group, or person that has, or is identified with people who have, one or more of the characteristics protected in this Section.
2. “Bias-motivated crime” means a crime described in this Section that is intentionally committed, in whole or in part, because of the offender’s perception of the race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim or the victim’s association with a person or group with these actual or perceived characteristics.
3. “Gender Identity” refers to a person’s sense of being female, male, neither or some combination of both. When one’s gender identity and assigned sex at birth are not congruent, the individual may identify as transgender, transsexual, or genderqueer.
4. “Homeless status” means that the victim:
  - a. Lacks a fixed, regular, and adequate nighttime residence; or
  - b. Has a primary nighttime residence that is:
    - i. A supervised publicly or privately operated shelter designed to provide temporary living accommodations; or
    - ii. A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.
5. “In whole or in part because of” means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic.
6. “Mental or physical disability” means that the victim suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, and has one or more physical or mental limitations that restrict the victim’s ability to perform the normal activities of daily living.

7. “Nation origin” includes citizenship, country of origin, and tribal affiliation.
8. “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual’s gender identity, appearance, expression, or behavior differs from that traditionally associated with the individual’s designated sex at birth.
9. “Victim” includes, but is not limited to, a person, family, group, individual, community center, educational facility, entity, office, meeting hall, place of worship, private institution, public agency, library, or other victim or intended victim of the offense.

**B. Penalty enhancements for bias-motivated crimes.** Penalties shall be reclassified as provided in this Section if a person intentionally selects the victim of the crime or selects the property that is damaged or otherwise affected by the crime, in whole or in part, because of his or her perception of the race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim or the victim’s association with a person or group with these actual or perceived characteristics, whether or not the person’s perception was correct.

**C. Reclassification of Penalties.** The penalty for any felony or misdemeanor described in this Section shall be reclassified as follows:

1. [describe original and new level of offense or punishment, based on the Tribe’s penalty classification system].
2. [describe original and new level of offense or punishment, based on the Tribe’s penalty classification system].
3. [describe original and new level of offense or punishment, based on the Tribe’s penalty classification system].

**Commentary:** *This section should be tailored to fit the Tribe’s classification scheme. The reclassification should provide for the penalty to be at least one degree more serious than that imposed for commission of the underlying offense.*

**D. Perception or Knowledge of Defendant.** It is an essential element of this Section that the record reflects that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated in this Section.

**E. Special Verdict Required.** This Section provides for the enhancement of the penalties



applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in Subsections (B) and (D).

**F. Not Applicable to Certain Crimes.** This Section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception regarding another's race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, economic or social status, or association with a person or group with these actual or perceived characteristics, is required for a conviction for that crime.

**G. Civil Action.** A person or organization that establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this Section has a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney's fees and costs.

**Commentary:** *“Penalty enhancements, which are sometimes referred to as ‘aggravating sentencing clauses’ or ‘aggravating circumstances clauses’, can also be used to create a hate crime law. Simply put, they increase the penalty for a base offence when it is committed with a bias motive... When penalty enhancements are used to punish hate crimes, the question of bias motive is usually considered when the offender is sentenced. In other words, an offender must first be found guilty of the base offence, and then the court considers whether there is sufficient evidence of bias to apply a penalty enhancement...”<sup>275</sup>*

*“There are three main arguments to justify additional punishment for hate crimes. First, the symbolic value of the law can and should be utilized to demonstrate society’s rejection of crimes based on bias. The enactment of hate crime laws is a powerful expression of society’s condemnation of certain offences as especially reprehensible, and deserving of greater punishment. Second, criminal law penalizes the harm caused. As noted previously, hate crimes have a greater impact on the victim than ordinary crimes, and they also affect others who are members of the victim’s group. The justification for increased sentences is therefore the additional harm caused both to the individual and the community. Third, hate crime laws punish the greater culpability of the perpetrator. The perpetrator’s motive makes the crime more serious than if the offence had been committed without such motive. The criminal law frequently imposes increases penalties for acts based not only on their outcome, but on the intent of the perpetrator. This argument therefore assumes that it is the intent of the perpetrator to cause disproportionate harm, or that they are reckless to the risk of additional harm.”<sup>276</sup>*

*“Enacting a hate crime law as a penalty enhancement also has certain advantages and disadvantages. Penalty enhancements are easier to incorporate into a penal code, because codes usually list certain factors that can increase a sentence for a crime. Penalty enhancements can apply to a wide range of crimes, and failure to prove the facts supporting an enhancement will not jeopardize a conviction on the underlying offence. One significant disadvantage with a penalty enhancement law, however, is that a court’s decision to enhance the penalty on the basis of a bias*

*motive might not be part of the public record... A consequence is that an accused's criminal history cannot be used to determine whether he or she has a past history of bias motivated crimes. Moreover, in some states, previous convictions for bias crimes, even if publicly recorded, may only under very limited conditions be allowed as evidence in a later case. Without explicit recognition of the bias motive, the hate crime law loses much of its symbolic weight. Thus, a penalty enhancement, while easier to implement, may not fulfill the expressive function of recognizing and condemning a prohibited bias. This will depend in part on whether reasons for increasing the sentence are publicly stated and whether such convictions are included within hate crime data"<sup>277</sup>*

**NOTE:** Tribes may also choose to adopt a combination of approaches to hate crime laws, which could involve specific substantive crimes requiring a bias motive, as well as a general penalty enhancement statute for other crimes.

## PART D: BIAS-MOTIVATED CRIME REPORTING AND TRAINING

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Many of the jurisdictions that have adopted one of the approaches to hate crime legislation described above also mandate specific bias-motivated crime training and/or data collection requirements. For example, Arizona law requires that the department of public safety must report and collect data of criminal offenses based on sexual orientation,<sup>278</sup> Massachusetts' crime report unit must collect, summarize, and report hate crime data to the attorney general and others,<sup>279</sup> and the Louisiana Commission on Human Rights must collect and study statewide hate crime data and annually report the data to the governor and members of the legislature.<sup>280</sup>

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### SAMPLE TRIBAL ORDINANCE PROVISION

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The following sample language, which could be added to tribal criminal codes, is based on ADL's model legislation, as well as Oregon<sup>281</sup> and Florida law.<sup>282</sup>

**Section x. Bias-Motivated Crime: Law Enforcement Training and Reporting.**

- A. **Short Title.** This Section may be cited as the "Bias-Motivated Crime Training and Reporting Ordinance."
- B. **Bias-Motivated Crimes.** For purposes of this Section, bias-motivated crimes are crimes that are committed, in whole or in part, because of the perceived race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim or the victim's association with a person or group with these actual or perceived characteristics.
- C. **Training Required.** The [insert name of Law Enforcement Department] ("Department") of the [insert name of Tribe] ("Tribe") shall ensure that all police officers and certified reserve officers are trained to investigate, identify, respond to, and report bias-motivated crimes.
- D. **Data Collection and Reporting.** The Department shall collect data relating to incidents that are apparently motivated by prejudice based on the perceived race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, economic or social status, or citizenship of the victim.

1. The Department shall establish and maintain a central repository for the collection and analysis of the information collected pursuant to this Section.
  - a. Upon establishing such a repository, the Department shall develop a procedure to monitor, record, classify, and analyze the information.
  - b. The Department shall submit its procedure to the [Tribal Council/Business Committee] for approval.
2. The Department shall compile the data and report [monthly/annually] to the [Tribal Council/Business Committee] concerning such incidents, in such form and in such manner as prescribed by rules adopted by the Department.

E. **Limitation on Use and Content of Data.** Data collected pursuant to this Section shall be used only for research or statistical purposes and shall not include any information that may reveal the identity of an individual victim of a crime. Dissemination of such information shall be subject to all confidentiality requirements otherwise imposed by law.

## ENDNOTES

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<sup>1</sup> Williams Institute, *Poverty in the LGB Community* (March 2009).

<sup>2</sup> National Transgender Discrimination Survey, *Injustice at Every Turn: A Look at American Indian and Alaskan Native Respondents in the National Transgender Discrimination Survey* (October 2012), [http://www.thetaskforce.org/reports\\_and\\_research/ntds\\_nativeamerican\\_respondents](http://www.thetaskforce.org/reports_and_research/ntds_nativeamerican_respondents).

<sup>3</sup> *Id.*

<sup>4</sup> ELIZABETH M. DIAZ & JOSEPH G. KOSCIW, PH.D. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, SHARED DIFFERENCES: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS OF COLOR IN OUR NATION'S SCHOOLS (2009).

<sup>5</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>; GLAD, *Marriage: Tips and Traps*, <http://www.glad.org/uploads/docs/publications/marriage-tips-traps.pdf>.

<sup>6</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>7</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>8</sup> *Same-Sex Marriage in the United States*, *supra* note 6 (citing Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 6); M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (Chicago: University of Chicago Press 2003)).

<sup>9</sup> For a more comprehensive list of benefits available to spouses but not same-sex couples, *see Marriage: Tips and Traps*, *supra* note 5; Pawelski et al., *supra* note 5, at 349-364.

<sup>10</sup> For a more comprehensive list of these challenges, *see* Pawelski et al., *supra* note 5, at 349-364; *Marriage: Tips and Traps*, *supra* note 5; *Same-Sex Marriage in the United States*, *supra* note 6 (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>.

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<sup>11</sup> For a more comprehensive discussion of the benefits that marriage can provide to children, see Pawelski et al., *supra* note 5, at 349-364; *Marriage: Tips and Traps*, *supra* note 5.

<sup>12</sup> Pawelski et al., *supra* note 5, at 349-364.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *id.*; *Marriage: Tips and Traps*, *supra* note 5; *Same-Sex Marriage in the United States*, *supra* note 6 (citing *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 5; BADGETT, *supra* note 8).

<sup>15</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>16</sup> Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, *AZ. JOURNAL OF INTERNATIONAL & COMPARATIVE LAW* Vol. 26, No. 2, 524-525 (2009), <http://www.ajicl.org/AJICL2009/Bushyhead.pdf> (internal citations omitted).

<sup>17</sup> *Id.* (citing *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 416 (Conn. 2008)).

<sup>18</sup> Pawelski et al., *supra* note 5, at 349-364; *Marriage: Tips and Traps*, *supra* note 5.

<sup>19</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>20</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>21</sup> Pawelski et al., *supra* note 5, 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 6. 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>22</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 all marriages valid under the laws of the jurisdiction where and when performed valid within the jurisdiction of the Tulalip Tribes).

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<sup>23</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>.

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<sup>24</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.”).

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<sup>25</sup> New York, Marriage Equality Act, <http://open.nysenate.gov/legislation/bill/A8354-2011>.

<sup>26</sup> Connecticut sH.B., Substitute Senate Bill No. 899, Public Act No. 09-13, <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>. See also *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008).

<sup>27</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>28</sup> New Hampshire, 2009 N.H. Laws ch. 59, H.B. 73, <http://news.findlaw.com/wsj/docs/glrts/nh-same-sex-marriage.html>.

<sup>29</sup> District of Columbia, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Bill 18-482, <http://www.dccwatch.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*, <http://www.cnn.com/2012/05/31/us/ff-same-sex-marriage/index.html> (citing Lambda Defense Fund and National Conference of State Legislatures).

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<sup>30</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>31</sup> Bushyhead, *supra* note 16, at 534-535.

<sup>32</sup> *Id.* (internal citations omitted).

<sup>33</sup> *Id.*, at 531 (internal citations omitted).

<sup>34</sup> *Id.*, at 534-535 (internal citations omitted).

<sup>35</sup> Insert this WHEREAS only if your Tribe/ Nation has adopted such laws and measures.

<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.

<sup>37</sup> National Conference of State Legislators, *supra* note 15.

<sup>38</sup> Bushyhead, *supra* note 16, at 524-525.

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<sup>39</sup> National Conference of State Legislators, *supra* note 15.

<sup>40</sup> Bushyhead, *supra* note 16, at 524-525.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (citing *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 416 (Conn. 2008)).

<sup>44</sup> The following states have adopted domestic partnership laws: California; Oregon; Washington; Nevada; Hawaii; Maine; District of Columbia; and Wisconsin. National Conference of State Legislators, *supra* note 15. See also Wis. Stat., Ch. 770, <https://docs.legis.wisconsin.gov/statutes/statutes/770>; Hawaii, Act 1: Relating to Civil Unions, [http://www.capitol.hawaii.gov/session2011/bills/SB232\\_HD1\\_.pdf](http://www.capitol.hawaii.gov/session2011/bills/SB232_HD1_.pdf); South Africa, Civil Union Act, <http://www.home-affairs.gov.za/PDF/Acts/Civil%20Union%20Act.pdf>.

<sup>45</sup> Statutes of the Confederated Tribes of the Umatilla Indian Reservation, Family Law Code, Chapter 13: Domestic Partnerships, <http://www.umatilla.nsn.us/Family%20Law%20Code.pdf>.

<sup>46</sup> Coquille Indian Tribal Code, Chapter 740: Marriage and Domestic Partnership, <http://www.coquilletribe.org/documents/740MarriageandDomesticPartnership.pdf>.

<sup>47</sup> Oregon Family Fairness Act, <http://www.leg.state.or.us/07reg/measures/hb2000.dir/hb2007.en.html>.

<sup>48</sup> WASH REV. CODE, Ch. 26.60, <http://apps.leg.wa.gov/RCW/default.aspx?cite=26.60&full=true>.

<sup>49</sup> Cal. Assembly Bill 205, [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0201-0250/ab\\_205\\_bill\\_20030922\\_chaptered.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.html); Cal. Fam. Code, § 297-297.5, <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=00001-01000&file=297-297.5>.

<sup>50</sup> Domestic partners in Nevada are eligible for benefits that are similar to the rights and responsibilities of marriage, except that employers are not required to provide health care coverage for domestic partners. NRS Chapter 122A, <http://www.leg.state.nv.us/NRS/NRS-122A.html>.

<sup>51</sup> These rights, benefits, and responsibilities include: hospital visitation rights and medical decision-making for partners; automatic parentage of non-biological parents for children born after the Domestic Partnership is established; significant legal and financial obligations for partners; and dissolution provisions similar to legal divorce. Basic Rights Oregon, *Domestic Partnership Resource Guide* (2007), <http://www.basicrights.org/wp-content/uploads/2011/09/BRO-Domestic-Partnership-Resource-Guide-2008.pdf>.

<sup>52</sup> Del. Civil Union and Equality Act, [http://legis.delaware.gov/LIS/lis146.nsf/vwLegislation/SB+30/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis146.nsf/vwLegislation/SB+30/$file/legis.html?open).

<sup>53</sup> N. J. Civil Union Act, <http://www.state.nj.us/treasury/taxation/civilunionact.shtml>.

<sup>54</sup> R.I. H.B. 6103: An Act Relating to Domestic Relations – Civil Unions, <http://www.rilin.state.ri.us/BillText11/HouseText11/H6103Aaa.pdf>. Note: §15-3.1-5 of Rhode Island’s law exempts conscience and religious organizations and their staff from providing services related to the solemnization / celebration of a civil union and from treating a civil union as valid, if to do so would violate



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their sincerely held religious beliefs. As of May, 2012, it was reported that “only 52 same-sex couples ‘have obtained civil union licenses in the nine months since Rhode Island enacted a law allowing them,’ the ACLU reports, calling the measure a ‘complete failure.’ Gays and lesbians are shunning the law because of its broad exemption allowing religious organizations to ignore their relationships and are traveling to neighboring states for full marriage equality. Hundreds of same-sex couples have married in Massachusetts, draining more than \$8 million from the state’s economy.” Think Progress, *Rhode Island’s Civil Unions Law Deemed A ‘Complete Failure’*, <http://thinkprogress.org/lgbt/2012/05/03/475919/rhode-island-unions/?mobile=nc>.

<sup>55</sup> Hawaii’s Reciprocal Beneficiaries law provides limited state rights to two parties bound as reciprocal beneficiaries, including same-sex couples, relatives, and friends. Haw. Rev. Stat., Ch. 572C, <http://www.capitol.hawaii.gov>.

<sup>56</sup> ME. REV. STAT., Ch. 701, Tit. 22, §2710, <http://www.mainelegislature.org/legis/statutes/22/title22sec2710.html>. In Wisconsin, registered domestic partners are eligible for inheritance and survivor protections, family and medical leave, medical/hospital visitation rights, and exemption from the real estate transfer fee. Wis. Stat., Ch. 770: Domestic Partnership, <https://docs.legis.wisconsin.gov/statutes/statutes/770>.

<sup>57</sup> National Conference of State Legislators, *supra* note 15 (citing Illinois Religious Freedom Protection and Civil Union Act, S.B. 1716 (Pub. Act 96-1513)).

<sup>58</sup> Pawelski et al., *supra* note 5, at 349 -364.

<sup>59</sup> Committee on Psychosocial Aspects of Child and Family Health, Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 3 (2002), <http://pediatrics.aappublications.org/content/109/2/339.full>.

<sup>60</sup> *All Children Matter: How Legal and Social Inequities Hurt LGBT Families*, <http://action.familyequality.org/site/DocServer/AllChildrenMatterCondensedFinal10192011.pdf?docID=2403>.

<sup>61</sup> *Id.*

<sup>62</sup> GLAD, *Adoption Questions & Answers*, at 1 (November 2011), <http://www.glad.org/uploads/docs/publications/adoption.pdf>.

<sup>63</sup> Often, the legal relationship between the birth parents and the child ends upon adoption. However, some tribes recognize customary adoptions, which provide children with permanent homes without compelling a termination of parental rights, and are often a more culturally-appropriate option. *See, e.g.*, California Indian Legal Services, *Tribal Customary Adoption*, <http://www.calindian.org/alerts/62-2010-alert/99-tribal-customary-adoption> (January 8, 2010). In addition, some jurisdictions allow an “open adoption” in which the adoptive family provides some information to or access to the child to the birth family. *Adoption Questions & Answers*, *supra* note 62, at 2-3.

<sup>64</sup> *Id.*

<sup>65</sup> Wikipedia, *LGBT Adoption*, [http://en.wikipedia.org/wiki/LGBT\\_adoption](http://en.wikipedia.org/wiki/LGBT_adoption).

<sup>66</sup> *Adoption Questions & Answers*, *supra* note 62, at 1.

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<sup>67</sup> These states include New Jersey, New York, Indiana, Maine, California, Connecticut, Illinois, Massachusetts, Oregon, Vermont, Florida. *Id.* With one exception (Siletz Juvenile Code, § 8.039, recognizes adoption by domestic partners), we did not find any tribal statutes or tribal court cases addressing adoption by same-sex couples or LGTBQ individuals. Adoption by same-sex couples is currently legal in fourteen countries (plus some territories of three other countries). *LGBT Adoption*, *supra* note 65.

<sup>68</sup> These states include Alaska, Colorado, Delaware, Maryland, Michigan, Minnesota, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, Tennessee, Washington, and Wisconsin. Pawelski et al., *supra* note 5, at 349-364.

<sup>69</sup> Mississippi bans adoptions by same-sex couples, and Utah bans adoptions by unmarried cohabiting couples, thereby effectively excluding same-sex couples. *Adoption Questions & Answers*, *supra* note 62, at 4 (citing Miss. Code Ann. § 93-17-3; Ut. Code §78-30-1(3)(b)). Other states restricting LGBT adoption include MI, MS, NE, ND, UT, and AR. *Id.* In addition, Michigan courts have found that unmarried individuals may not jointly petition to adopt, and courts have ruled that second-parent adoptions are not available under current law in Kentucky, Nebraska, and Ohio. Human Rights Campaign, *Parenting Laws: Joint Adoption*, [http://www.hrc.org/files/assets/resources/parenting\\_laws\\_maps.pdf](http://www.hrc.org/files/assets/resources/parenting_laws_maps.pdf); NRCPPFC & AdoptUsKids, *LGBT Adoptive and Foster Parenting* (October 2010), [http://www.hunter.cuny.edu/socwork/nrcfcpp/info\\_services/download/LGBTAdoptiveandFosterParenting.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/download/LGBTAdoptiveandFosterParenting.pdf). Florida's 3-decade ban on adoptions by gay individuals was ruled unconstitutional in September 2010. *Id.*

<sup>70</sup> *Adoption Questions & Answers*, *supra* note 62, at 4. "Social conservatives view family makeup as the next battleground after passing marriage amendments in 11 states in 2004." *Id.* For example, in 2006, efforts were underway in at least 16 states "to introduce constitutional amendments prohibiting gay and lesbian individuals and couples from fostering or adopting children." Pawelski et al., *supra* note 5, at 349-364. *Id.* Similarly, in early 2011, three states considered bills or policies that would limit adoption rights for unmarried and/or same-sex couples. Dana Rudolph, *HHS Urges Child Welfare Agencies to Better Serve LGBT Youth* (April 20, 2011), <http://www.keenewsservice.com/2011/04/20/hhs-urges-child-welfare-agencies-to-better-serve-LGBT-youth/>.

<sup>71</sup> *Adoption Questions & Answers*, *supra* note 62, at 1.

<sup>72</sup> *All Children Matter*, *supra* note 60.

<sup>73</sup> *LGBT Adoption*, *supra* note 65.

<sup>74</sup> ACLU, *In re: Gill - The Child Welfare Position*, [http://www.aclu.org/lgbt-rights\\_hiv-aids/re-gill-child-welfare-position](http://www.aclu.org/lgbt-rights_hiv-aids/re-gill-child-welfare-position).

<sup>75</sup> Wikipedia, *Same Sex Marriage and the Family*, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_and\\_the\\_family](http://en.wikipedia.org/wiki/Same-sex_marriage_and_the_family) (citing Pawelski et al., *supra* note 5). American Academy of Pediatrics has also stated: "Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or the opposite sex. The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual." ACLU, *supra* note 74.

<sup>76</sup> American Bar Association, *Report*, at 2, <http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/103d.authcheckdam.pdf>.

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<sup>77</sup> *Adoption Questions & Answers*, *supra* note 62, at 11-12 (citing American Bar Association, Resolution 109B (adopted Feb. 8, 1999)).

<sup>78</sup> North American Council on Adoptable Children, *NACAC Position Statements*, <http://www.nacac.org/policy/positions.html#Gay>.

<sup>79</sup> *All Children Matter*, *supra* note 60. In many jurisdictions, there is a shortage of adoptive parents, although federal law has spurred states to move children into permanent homes more quickly. *Adoption Questions & Answers*, *supra* note 62, at 2.

<sup>80</sup> Human Rights Campaign, *Issue: Adoption*, <http://www.hrc.org/issues/adoption>.

<sup>81</sup> Rudolph, *supra* note 70 (citing a 2007 study by the Williams Institute at UCLA).

<sup>82</sup> *Adoption Questions & Answers*, *supra* note 62, at 2.

<sup>83</sup> *Id.*, at 3.

<sup>84</sup> *Id.* For example, single parent adoption by LGBT individuals now happens in every New England state. *Id.*

<sup>85</sup> Human Rights Campaign, *Second Parent Adoption*, <http://www.hrc.org/resources/entry/second-parent-adoption>.

<sup>86</sup> Tulalip Tribal Code, §81.3.2.4(A)(1), [http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/beda\\_chelh/bedachelh\\_youth\\_code.pdf](http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/beda_chelh/bedachelh_youth_code.pdf); Grand Ronde Tribal Code, §7.16(b)(3)(A)(i), [http://www.grandronde.org/uploadedfiles/webroot\\_content/departments/tribal\\_court/tribal\\_court\\_packets/adoption%20packet.pdf](http://www.grandronde.org/uploadedfiles/webroot_content/departments/tribal_court/tribal_court_packets/adoption%20packet.pdf). See also Colville Tribal Code, §5-2-371, <http://www.colvilletribes.com/media/files/5-2.pdf> (a minor child may be adopted by “any adult person...”)

<sup>87</sup> Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, Tribal Code, §4-8-3, <http://ctclusi.org/sites/default/files/4-8.pdf>.

<sup>88</sup> Confederated Tribes of Siletz Indians, Juvenile Code, §8.039(c), <http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Juvenile%20Code%20Final%2007-16-10.pdf> (emphasis added).

<sup>89</sup> *LGBT Adoptive and Foster Parenting*, *supra* note 69.

<sup>90</sup> OR. REV. STAT. §109.309(1) (“Any person may petition the circuit court for leave to adopt another person...”); Wash. Rev. Code § 26.33.140; N.J. STAT. ANN., § 9:3-43; VT. STAT. ANN. TIT. 15A § 1-102(A); D.C. CODE § 16-302.

<sup>91</sup> See, e.g., ALASKA STAT. § 25.23.020; ARIZ. REV. STAT. § 8-103; CO. REV. STAT. § 19-5-202; ALA. CODE § 26-10A-5; ME. REV. STAT. ANN tit. 18-A § 9-301; N.Y. DOM. REL. § 110.

<sup>92</sup> *Adoption Questions & Answers*, *supra* note 62, at 3 (citing *Adoption of M.A.*, 930 A.2d 1088 (2007) (permitting lesbian couple to proceed with adoption; *In re M.M.D.*, 662 A.2d 837 (D.C. 1995) (joint adoption petitions by unmarried couples, both opposite- and same-sex, should be granted or rejected on a case-by-case

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basis, based on the best interest of the child); *In the Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995) (“the state’s adoption law ‘does not prohibit adoption by a couple, neither of whom is a biological parent.’”).

<sup>93</sup> *Id.*, at 14 (citing *Adoption of M.A.*, 930 A.2d 1088 (Me. 2007)).

<sup>94</sup> *Id.*, at 3.

<sup>95</sup> *LGBT Adoptive and Foster Parenting*, *supra* note 69.

<sup>96</sup> N.Y. COMP. CODES R. & REGS tit. 18, § 421.16(h)(2), <http://www.dos.ny.gov/info/nycrr.html>.

<sup>97</sup> Conn. Dep’t of Children and Families, *Frequently Asked Questions*, <http://www.ct.gov/dcf/cwp/view.asp?a=2561&Q=314314#Samegender>.

<sup>98</sup> Oregon DHS, *Adoption: Who Can Apply*, <http://www.oregon.gov/dhs/children/fosteradopt/pages/adopt/whocanapply.aspx> (internal citations omitted) (emphasis added). Likewise, according to the Vermont Department of Children and Families, to apply to adopt a child: “You must be at least 21 years old. You can be single, married, living with a partner, or joined through a civil union. You can live in a house or apartment, but you must have enough room to house a child. You must have sufficient income to support your family. Applications are considered regardless of race, ethnicity, gender, religion, or sexual orientation.” Vt. Dep’t of Children and Families, *Who Can Apply*, <http://dcf.vermont.gov/projectfamily/adopting/who>. See also Wa. Dep’t of Social and Health Services, *Adoption in Washington State*, at 4, <http://www.dshs.wa.gov/pdf/Publications/22-1096.pdf> (stating that same-sex couples can adopt a child).

<sup>99</sup> N.J. ADMIN. CODE 10:121C-2.6(a), <http://www.njcpac.org/admin.asp?uri=2081&action=15&di=143&ext=pdf&view=yes>. See also *Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995) (finding that DYFS is prohibited from discriminating against prospective adoptive parents on the basis of sexual orientation).

<sup>100</sup> NEV. ADMIN. CODE 127.351, <http://www.leg.state.nv.us/nac/NAC-127.html>.

<sup>101</sup> MD. CODE REGS. 07.05.03.09(A)(2), <http://www.dsd.state.md.us/comar/getfile.aspx?file=07.05.03.09.htm>.

<sup>102</sup> “According to a report by the [Williams Institute](#), in 2007 there were 270,000 children in the United States who lived with same-sex couples. Of these, one-quarter, or 65,000, were adopted.” *LGBT Adoption*, *supra* note 65 (citing Adam Romero, *Census Snapshot*, [Williams Institute](#), December 2007).

<sup>103</sup> *Second Parent Adoption*, *supra* note 85.

<sup>104</sup> For example, if a child is born using donor insemination, the partner of the birth mother may be a legal stranger to the child, despite acting as a parent from birth. Katharine Swan, *All About Second Parent Adoptions for Gay Families*, <http://www.therainbowbabies.com/SecondParentAdoption.html>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Adoption Questions & Answers*, *supra* note 62, at 9.

<sup>108</sup> *Id.*, at 11-12.

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<sup>109</sup> *All Children Matter*, *supra* note 60.

<sup>110</sup> *Adoption Questions & Answers*, *supra* note 62, at 11-12 (citing *Adoption of Tammy*, 416 Mass. 205, 215 (1993)).

<sup>111</sup> For example, in states that recognize same-sex marriages, “a child born during a marriage is presumed to be the child of both spouses, including a child born to a married woman with the use of donor sperm, who is presumed to be the child of the ‘husband,’ and therefore presumably of the partner.” *Marriage: Tips and Traps*, *supra* note 5 (citing MASS. GEN. LAWS ch. 209C, § 6). However, this presumption does not provide the same level of protection as a family would gain by going through the legal process of jointly adopting a child born during the marriage. For more discussion of the presumption of paternity, *see, e.g.*, Lambda Legal, *Gartner v. Newton*, <http://lambdalegal.org/in-court/cases/gartner-v-newton>; Zack Ford, *Iowa Judge: Both Same-Sex Parents’ Names Belong On Birth Certificates* (January 5, 2012), <http://thinkprogress.org/lgbt/2012/01/05/398283/iowa-judge-both-same-sex-parents-names-belong-on-birth-certificates/>.

<sup>112</sup> *Adoption Questions & Answers*, *supra* note 62, at 12. For example, in *Miller-Jenkins v. Miller-Jenkins*, Janet and Lisa, parties to a civil union in Vermont, had a child named Isabella. Janet did not adopt Isabella, and when Janet and Lisa separated, Lisa moved to Virginia and used the lack of an adoption—and Virginia’s laws hostile to same-sex relationships—to prevent Janet from having contact with Isabella. The resulting litigation, which began in 2004, has involved two state Supreme Courts, and made several trips to the U.S. Supreme Court. *Id.*

<sup>113</sup> *Adoption Questions & Answers*, *supra* note 62, at 11-12.

<sup>114</sup> *Id.* (citing *Coparent or Second-Parent Adoption by Same-Sex Parents*, *supra* note 59, at 339-40).

<sup>115</sup> Human Rights Campaign, *American Bar Association*, <http://preview.hrc.org/issues/1590.htm> (quoting the American Bar Association’s position statement).

<sup>116</sup> *Adoption Questions & Answers*, *supra* note 62, at 2.

<sup>117</sup> *See* Conn. sH.B. 5830, <http://www.cga.ct.gov/2000/act/pa/2000PA-00228-R00HB-05830-PA.htm>. In addition, “Appellate courts have ruled that state adoption laws permit second-parent adoption in California, District of Columbia, Illinois, Indiana, Massachusetts, New Jersey, New York, and Pennsylvania.” Pawelski et al., *supra* note 5, at 349-364. *See also* *Adoption Questions & Answers*, *supra* note 62, at 15 (citing numerous cases).

<sup>118</sup> *Adoption Questions & Answers*, *supra* note 62, at 9.

<sup>119</sup> *Id.*, at 2 (citing VT. STAT. ANN. TIT. 15A, §1-102(B)).

<sup>120</sup> Co. HB 07-1330, [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/digest2007a/07digest.pdf](http://www.state.co.us/gov_dir/leg_dir/olls/digest2007a/07digest.pdf).

<sup>121</sup> Co. HB 07-1330, [http://www.leg.state.co.us/clics/clics2007a/csl.nsf/b404d50252f9cdcf85256d6d000d18cb/02f7babc52f718bd87257268007869de/\\$FILE/wptemp.txt](http://www.leg.state.co.us/clics/clics2007a/csl.nsf/b404d50252f9cdcf85256d6d000d18cb/02f7babc52f718bd87257268007869de/$FILE/wptemp.txt).

<sup>122</sup> *All Children Matter*, *supra* note 60.

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<sup>123</sup> See, e.g., Swinomish Tribal Code, §7-04.010 (“In any proceeding between parents under this Chapter, the best interest of the child shall be the standard by which the Tribal Court determines and allocates parental responsibilities. The Tribe recognizes the fundamental importance of the parent-child relationship and that the relationship between the child and each parent should be fostered unless inconsistent with the best interest of the child. The best interests of the child are served by a parenting arrangement that best maintains a child’s emotional growth, tribal and cultural ties, health and stability, and physical care.”); Coquille Indian Tribal Code, §743.100 (similar language); NY CLS DOM. REL. §70 (“In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.”); MASS. GEN. LAWS, ch. 208, § 28; § 31 (“In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child’s present or past living conditions adversely affect his physical, mental, moral or emotional health.”).

<sup>124</sup> Human Rights Campaign, *Laws and Regulations*, <http://www.hrc.org/laws-and-legislation/state>. See *id.* for a more complete discussion of state custody and visitation laws.

<sup>125</sup> *Id.* (citing *In re Marriage of Collins*, 51 P.3d 691 (Or. Ct. App. 2002)). The court reversed a trial court’s modification of custody in favor of a heterosexual father, finding that the trial court relied too heavily on a non-exhibitionist display of intimacy (kissing in bed) between the child’s mother and her same-sex partner. See also *Id.*, citing *A. v. A.*, 514 P.2d 358 (Or. Ct. App. 1973) (refusing to modify a lower court’s award of custody to a gay father, finding that there was no evidence that the children were exposed to deviant sexual acts or that the welfare of the children was being adversely affected in any substantial way by their father’s sexual orientation.); *In re Marriage of Ashling*, 599 P.2d 475 (Or. Ct. App. 1979) (“finding that a visitation agreement that restricted the mother’s visitation to ‘times and places that petitioner does not have with her, in her home, or around the children, any lesbians,’ was not justified. The court reasoned that as long as the mother’s sexual life remained discreet, regardless of her sexual orientation, there was no reason to restrict visitation.”).

<sup>126</sup> *Laws and Regulations*, *supra* note 124 (citing *Paul C. v. Tracy C.*, 209 A.D.2d 955 (N.Y. App. Div. 1994)). See also *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980) (“Natural parents should be denied custody only if they are unfit to further the welfare of their children. ... In the total absence of evidence suggesting a correlation between the mother’s homosexuality and her fitness as a parent, we believe that the [trial] judge’s finding that a lesbian household would adversely affect the children to be without basis in the record.”).

<sup>127</sup> American Bar Association, *Sexual Orientation as a Factor in Child Custody & Visitation Cases* (1995), [http://www.americanbar.org/groups/child\\_law/policy/child\\_custody\\_and\\_support.html](http://www.americanbar.org/groups/child_law/policy/child_custody_and_support.html).

<sup>128</sup> D.C. CODE § 16-914(a)(1)(A), <http://government.westlaw.com/linkedslice/default.asp?SP=DCC-1000>.

<sup>129</sup> *LGBT Families: Facts at a Glance* (October 2011), [http://www.americanprogress.org/issues/2011/10/pdf/all\\_children\\_facts.pdf](http://www.americanprogress.org/issues/2011/10/pdf/all_children_facts.pdf).

<sup>130</sup> *LGBT Adoptive and Foster Parenting*, *supra* note 69; Pawelski et al., *supra* note 5, at 349-364. However, Arkansas’ regulation prohibiting gay and lesbian foster parenting was declared unconstitutional in December 2004. *Id.* In addition, in February 2006, a Missouri court overturned a state policy prohibiting foster parenting by gay and lesbian individuals and/or same-gender couples. *Id.*

<sup>131</sup> *Id.*

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<sup>132</sup> *LGBT Adoptive and Foster Parenting*, *supra* note 69.

<sup>133</sup> National Center for Lesbian Rights, *AB 458 FACT SHEET: California Foster Care Non-Discrimination Act*, [http://www.nclrights.org/site/DocServer/ab458\\_fact\\_sheet.pdf?docID=1321](http://www.nclrights.org/site/DocServer/ab458_fact_sheet.pdf?docID=1321).

<sup>134</sup> *Id.*

<sup>135</sup> CAL. WELF. & INST. CODE § 16001.9(a)(22).

<sup>136</sup> Rudolph, *supra* note 70.

<sup>137</sup> *Id.*

<sup>138</sup> Hoopa Valley Tribe, Child / Family Assistance Code, §14.19.06, <http://www.narf.org/nill/Codes/hoopacode/Title%2014%20Child%20Family%20Assistance%20Code%20une%2019%202008.pdf>.

<sup>139</sup> Child Welfare League of America, *CWLA Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care* (2006), <http://www.nclrights.org/site/DocServer/bestpracticeslgbtyouth.pdf?docID=1322>. See also Rudolph, *supra* note 70 (noting that a higher percentage of LGBT youth exist in the child welfare system and among those living on the streets than would be expected based on the estimated percentage of LGBT people in the general population).

<sup>140</sup> National Center for Lesbian Rights, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know When Working with LGBT Youth* (June 2006), [http://www.nclrights.org/site/DocServer/LegalRights\\_LGBT\\_State\\_Custody.pdf?docID=1741](http://www.nclrights.org/site/DocServer/LegalRights_LGBT_State_Custody.pdf?docID=1741).

<sup>141</sup> *Id.*

<sup>142</sup> *CWLA Best Practice Guidelines*, *supra* note 139.

<sup>143</sup> *The Legal Rights of Young People in State Custody*, *supra* note 140.

<sup>144</sup> *CWLA Best Practice Guidelines*, *supra* note 139. “The institutional legacy of systemic failure to provide informed guidance on these issues is reflected in disturbingly common practices:

- A child welfare worker considers a young gay boy unadoptable solely because of his sexual orientation.
- Line staff in a group home fail to intervene when residents harass and abuse a transgender youth because they believe he ‘asked for it’ by being open about his gender identity.
- Relative caregivers send a lesbian teen to a counselor for reparative therapy in a misguided attempt to try to change her sexual orientation, even though the major professional associations, including the American Psychiatric Association and the American Academy of Pediatrics, specifically caution against this practice.
- Detention facility staff place a gay youth in isolation “for his own protection,” depriving him of education, recreation, companionship, or other programming and services.
- Foster parents ridicule and demean a young boy in their custody whom they perceive to be effeminate, calling him a sissy and exhorting him to “stop acting like a girl.”
- Child welfare personnel repeatedly move a lesbian youth from one inappropriate placement to another, subjecting her to constant rejection and discrimination and depriving her of a permanent home or family.
- A transgender girl refuses to shower with the boys in her detention unit because she is afraid for her safety. The facility will not allow her to have private shower time, even though she has reported ongoing abuse and threats of violence from the boys, and so she does not shower.” *Id.*

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<sup>145</sup> Hoopa Valley Tribe, Child/Family Assistance Code, §14.19.06(23), <http://www.narf.org/nill/Codes/hoopacode/Title%2014%20Child%20Family%20Assistance%20Code%20une%2019%202008.pdf>.

<sup>146</sup> *The Legal Rights of Young People in State Custody*, *supra* note 140.

<sup>147</sup> Rudolph, *supra* note 70.

<sup>148</sup> Alameda Co. Soc. Serv. Agency, *Department of Children and Family Services LGBT Policy*, <http://pathwaytohome.org/adoption/LGBTPolicyFinalapproved3-6-07.pdf>. See also Children's Aid Soc. of Toronto, *Board Governance Policy: Equitable Child Welfare Services Relating to Sexual Orientation and Gender Identity/Expression*, <http://www.torontocas.ca/files/Equitable%20Child%20Welfare%20Serv%20Rel.%20S-0%20&%20Gender%20Policy.adopted.mar-08.pdf>.

<sup>149</sup> City of N.Y., Div. of Child Prot. (2009), [http://www.hunter.cuny.edu/socwork/nrcfcpp/info\\_services/assessing\\_safety\\_LGBT\\_youth\\_signed\\_0522009.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/assessing_safety_LGBT_youth_signed_0522009.pdf). Similarly, "Connecticut policy provides: 'The Department of Children and Families has an obligation to ensure fair, equal, and non-discriminatory treatment of all individuals who identify themselves as Lesbian, Gay, Bisexual, Transgender, Questioning and Intersex....' This policy, and others like it in Illinois and Massachusetts, as well as in the cities of New York and Los Angeles, serve as clear statements of support for LGBT youth and demonstrate a commitment to providing non-discriminatory care." *The Legal Rights of Young People in State Custody*, *supra* note 140.

<sup>150</sup> California, AB 458: California Foster Care Non-Discrimination Act, [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0451-0500/ab\\_458\\_bill\\_20030908\\_chaptered.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_458_bill_20030908_chaptered.html).

<sup>151</sup> Out of Home Youth Advocacy Council, *Creating Inclusive Services for LGBT Youth in Out of Home Care Training Resources*, at 10 (March 2007), [http://www.nclrights.org/site/DocServer/Preface\\_OHYAC\\_training\\_FINAL.pdf?docID=2921](http://www.nclrights.org/site/DocServer/Preface_OHYAC_training_FINAL.pdf?docID=2921).

<sup>152</sup> *Id.*, at 28.

<sup>153</sup> *Id.*, at 38-39.

<sup>154</sup> Human Rights Campaign, *Pass EDNA Now*, <http://sites.hrc.org/sites/passendanow/index.asp>.

<sup>155</sup> ACLU, *Employment Non-Discrimination Act*, [http://www.aclu.org/hiv-aids\\_lgbt-rights/employment-non-discrimination-act](http://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act).

<sup>156</sup> Human Rights Campaign, *What is EDNA?*, [http://sites.hrc.org/sites/passendanow/learn\\_more.asp](http://sites.hrc.org/sites/passendanow/learn_more.asp).

<sup>157</sup> M. V. Lee Badgett, Testimony on S.811, The Employment Non-Discrimination Act of 2011, U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS (June 12, 2012), <http://williamsinstitute.law.ucla.edu/research/workplace/testimony-s811-061212/>. "Most recently, the 2008 General Social Survey found that 42% of a national random sample of lesbian, gay, and bisexual people had experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives. In addition 27% had experienced employment discrimination during the five years prior to the survey. That figure includes both employees who have disclosed their sexual orientation in the workplace and those who have not." *Id.* "Findings from recent surveys of transgender employees confirm



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similar and even more common experiences of discrimination. For example, in the largest survey of transgender people to date, 78% of respondents reported experiencing at least one form of harassment or mistreatment at work because of their gender identity. More specifically, 47% had been discriminated against in hiring, promotion, or job retention.” *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* “A key link between policies and productivity is disclosure of one’s sexual orientation. Many studies have demonstrated that fear of discrimination keeps LGB workers, particular from revealing their sexual orientation in the workplace... Studies find that people who have come out report lower levels of anxiety, less conflict between work and personal life, greater job satisfaction, more sharing of employers’ goals, higher levels of satisfaction with their co-workers, more self-esteem, and better physical health. So when fear of discrimination causes LGB employees to conceal their sexual orientation or gender identity, employers experience negative costs along with LGB people themselves. The time as well as social and psychological energy that is required to maintain a hidden identity would, from an employer’s perspective, be better used on the job.” *Id.*

<sup>160</sup> *What is EDNA?*, *supra* note 156.

<sup>161</sup> Badgett, *supra* note 157. In addition, the gap in differential treatment of gay male job applicants was significantly smaller in states or local areas with nondiscrimination laws that included sexual orientation: 8.7% received invitations compared with 5.3% in states without such protections. However, the heterosexual applicants still received more favorable treatment than their gay counterparts. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *What is EDNA?*, *supra* note 156.

<sup>164</sup> Badgett, *supra* note 157.

<sup>165</sup> Shoshone-Bannock Tribes, Worker Protection Ordinance, §401, <http://www.shoshonebannocktribes.com/tero/PDF/Worker%20Protection%20Ordinance.PDF>.

<sup>166</sup> Mandan Hidatsa and Arikara Nation, Employment Rights and Contracts Preference Ordinance, §206(a), [http://mhatero.com/attachment/cms/AXT\\_3\\_IL6J.pdf](http://mhatero.com/attachment/cms/AXT_3_IL6J.pdf). *See also* Poarch Creek Indians, Tribal Employment Rights Ordinance, §33-4-1, [http://www.poarchcreekindians.org/ms/pdf/11/0822\\_tero.pdf](http://www.poarchcreekindians.org/ms/pdf/11/0822_tero.pdf) (“The Tribal Council finds ... [t]he practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction records, membership in the national guard, or any other reserve component of the military forces of the United States adversely affects the welfare of the Reservation and deprives those individuals of the earnings that are necessary to maintain a just and decent standard of living.”).

<sup>167</sup> *What is EDNA?*, *supra* note 156. The following states protect against employment discrimination on the basis of both sexual orientation and gender identity: California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington. In addition to the states listed above, the following states prohibit discrimination based on sexual orientation: Delaware, Maryland, New Hampshire, New York, and Wisconsin. Human Rights Campaign, *Why is it needed?*, [http://sites.hrc.org/sites/passendanow/why\\_is\\_it\\_needed.asp](http://sites.hrc.org/sites/passendanow/why_is_it_needed.asp).

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168 *Id.*

169 Employment Non-Discrimination Act (H.R. 1397 & S. 811), <http://www.govtrack.us/congress/bills/112/hr1397/text>. ENDA was introduced in the 112th Congress on April 6, 2011 by Representative Barney Frank in the House (H.R. 1397) and on April 13, 2011 by Senator Jeff Merkley in the Senate (S. 811). The U.S. Senate Committee on Health, Education, Labor and Pensions hosted a committee hearing on ENDA on June 12, 2012.

170 *What is EDNA?*, *supra* note 156. EDNA “is closely modeled on existing civil rights laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. The bill explicitly prohibits preferential treatment and quotas and does not permit disparate impact suits. In addition, it exempts small businesses, religious organizations and the military, and does not require that domestic partner benefits be provided to the same-sex partners of employees.” *Id.* See also U.S. Department of Labor Wage and Hour Division, Administrator’s Interpretation No. 2010-3: Clarification of the Definition of “son or daughter” in Family and Medical Leave Act (June 22, 2010), [http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf); Barack Obama, *Memorandum: Federal Benefits and Non-Discrimination* (June 17, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/).

171 Oregon Equality Act, Pub. L. No. 100, Or. S.B. 2 (2007), <http://www.leg.state.or.us/07reg/measures/sb0001.dir/sb0002.intro.html>.

172 California Fair Employment and Housing Act, <http://finduslaw.com/california-fair-employment-housing-act-feha-government-code-12900-12996>; California Civil Rights Act of 2007, [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_14\\_bill\\_20070919\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_14_bill_20070919_enrolled.pdf); California Equal Benefits Ordinance, [ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab\\_0001-0050/ab\\_17\\_bill\\_20031011\\_chaptered.pdf](ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab_0001-0050/ab_17_bill_20031011_chaptered.pdf).

173 Co. S.B. 07-025: An Act Concerning the Expansion of Employment Non Discrimination Protections, and Making an Appropriation Therefor, [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/sl2007a/sl\\_295.pdf](http://www.state.co.us/gov_dir/leg_dir/olls/sl2007a/sl_295.pdf).

174 Blackfeet Nation, The Blackfeet Tribal Employment Rights Ordinance & Safety Enforcement Act of 2009, [http://www.btero.com/blackfeet\\_tero\\_2010.pdf](http://www.btero.com/blackfeet_tero_2010.pdf).

175 Nottawaseppi Huron Band of the Potawatomi, Fair Employment Practices Code, <http://www.nhbpi.com/pdfs/legal/Title%20V-02%20Fair%20Tribal%20Employment%20Practices%20Code.pdf>.

176 Lisa Mottet and Justin Tanis, *Opening the door to the inclusion of transgender people: The Nine Keys to Making Lesbian, Gay, Bisexual and Transgender Organizations Fully Transgender-Inclusive*, 56-57, [http://transequality.org/Resources/opening\\_the\\_door.pdf](http://transequality.org/Resources/opening_the_door.pdf)

177 Center for American Progress. *Why We Need Protections in Housing, Health Care, and Public Accommodations*, <http://www.americanprogress.org/issues/lgbt/report/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/>.

178 Human Rights Campaign, *Housing for LGBT People: What You Need to Know About Property Ownership and Discrimination*, <http://www.hrc.org/resources/entry/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and>.

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<sup>179</sup> Center for American Progress, *supra* note 177.

<sup>180</sup> Tribal Court Clearinghouse, Model Tribal Housing Code, §1-4-4(F), <http://www.tribal-institute.org/codes/overview.htm>.

<sup>181</sup> Coquille Indian Housing Authority, Request for Proposals, [http://www.coquilletribe.org/documents/7-RoofingRFPGroup6-3-BedroomTypeA06-22-12\\_000.pdf](http://www.coquilletribe.org/documents/7-RoofingRFPGroup6-3-BedroomTypeA06-22-12_000.pdf).

<sup>182</sup> OR. REV. STAT. § 659A.403 (prohibiting discrimination in place of public accommodation on account of race, color, religion, sex, sexual orientation, national origin, marital status or age).

<sup>183</sup> WASH. REV. CODE § 49.60.130-175, 176, 178, 180, 190, 200, 215, 222-225, 300; WASH. ADMIN. CODE § 356-09-020 (prohibiting discrimination based on sexual orientation in the areas of real property transactions, credit and insurance and public accommodations. The definition of sexual orientation includes gender identity and expression).

<sup>184</sup> HAW. REV. STAT. §515-2 (prohibiting discrimination based on sexual orientation and gender identity in employment, public accommodations and housing).

<sup>185</sup> CONN. GEN. STAT. § 46a - 81c-m (prohibiting discrimination based on gender identity in categories that include public accommodations, housing, and employment).

<sup>186</sup> CAL. GOV. CODE §§ 12920; 51; California Civil Rights Act of 2007 (prohibiting discrimination based on gender identity, appearance and behavior in the areas of employment (public and private), housing, and public accommodations).

<sup>187</sup> D.C. CODE §2-1401.01, 02, §2-1402.11, 21, 31, 41, 71, 73 (prohibiting discrimination based on sexual orientation and gender identity and expression in the areas of employment, schools, housing and public accommodations); *Why is it needed?*, *supra* note 167.

<sup>188</sup> Human Rights Campaign, *HRC Statement on New HUD Non-Discrimination Regulations*, <http://www.hrc.org/press-releases/entry/hrc-statement-on-new-hud-non-discrimination-regulations>.

<sup>189</sup> Gay, Lesbian & Straight Education Network, *2011 National School Climate Survey: LGBT Youth Face Pervasive, But Decreasing Levels of Harassment*, <http://www.glsen.org/cgi-bin/iowa/all/library/record/2897.html?state=research&type=research>.

<sup>190</sup> *All Children Matter*, *supra* note 60.

<sup>191</sup> *Id.*

<sup>192</sup> Among these states are Washington, Oregon, California, Colorado, Minnesota, Iowa, Illinois, Arkansas, N. Carolina, Maryland, New Jersey, Rhode Island, Vermont, New Hampshire, and Maine. *Laws and Regulations*, *supra* note 124.

<sup>193</sup> Oregon Equality Act, Pub. L. No. 100, Or. S.B. 2 (2007), <http://www.leg.state.or.us/07reg/measures/sb0001.dir/sb0002.intro.html>.

<sup>194</sup> CAL. ED. CODE § 220, <http://codes.lp.findlaw.com/cacode/EDC/1/d1/1/2/3/s220>.

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<sup>195</sup> CONN. GEN. STAT. § 10-15c, <http://www.cga.ct.gov/2011/pub/chap164.htm#Sec10-15c.htm>.

<sup>196</sup> N.H. REV. STAT. § 193-F:1 et. seq., <http://www.ndaa.org/pdf/Cyberbullying%20-%20Schools%20and%20Public%20Libraries2011.pdf>. See also § 105 ILL. COMP. STAT. §5/27-23.7, <http://ilga.gov/legislation/ilcs/fulltext.asp?DocName=010500050K27-23.7>; MINN. STAT. §363A.03 et seq., <https://www.revisor.mn.gov/statutes/?id=363a.13>.

<sup>197</sup> Vancouver School Board, *Lesbian, Gay, Bisexual, Transgender, Transsexual, Two-Spirit, Questioning Policy* (Feb. 2004), <http://www.safeschoolscoalition.org/VancouverSchoolBoardLGBTQ-POLICY-FEB2004.pdf>.

<sup>198</sup> Burnaby Board of Education, *Policy # 5.45: Homophobia / Heterosexism*, [http://www.lifesitenews.com/images/pdfs/burnaby\\_policy.pdf](http://www.lifesitenews.com/images/pdfs/burnaby_policy.pdf).

<sup>199</sup> School District No. 5, *Sexual Orientation*, § 3.35 (May 2, 2006), [http://bctf.ca/uploadedFiles/Social\\_Justice/Issues/Homophobia/SD5SexualOrientation.pdf](http://bctf.ca/uploadedFiles/Social_Justice/Issues/Homophobia/SD5SexualOrientation.pdf).

<sup>200</sup> Bushyhead, *supra* note 16 (internal citations omitted).

<sup>201</sup> “An advance directive is a written instruction, such as a living will or durable power of attorney for health care... is designed to direct the health care of the patient to whom it applies. An advance directive takes effect when the patient to whom it applies becomes incompetent to make medical decisions... If there is Tribal law that governs advance directives, it will apply for those Tribal members living on that Tribe’s reservation.” Indian Health Service, *Indian Health Manual*, §§3-26.1(E)(1); 3-26.2(F), [http://www.ihs.gov/ihtm/index.cfm?module=dsp\\_ihm\\_pc\\_p3c26](http://www.ihs.gov/ihtm/index.cfm?module=dsp_ihm_pc_p3c26). We did not find any tribal laws regarding advance directives or durable power of attorney for health care. In Oregon, however, a living will or advance directive may be used to appoint a durable power of attorney to make health care decisions and dictate health care instructions concerning life-sustaining treatment. OR. REV. STAT. Ch. 127; Bushyhead, *supra* note 16. An advance directive or living also permits tribal members to express their desire for traditional practices, such as traditional burials and avoidance of autopsy, organ donation, embalming, or burial delays.

<sup>202</sup> For example, in Wisconsin, a same-sex domestic partner has visitation rights in various health-care settings, similar to the visitation rights afforded to a spouse. Howard A. Sweet, *Matters Affected by Creation of a Same Sex Domestic Partnership*, 82 WISCONSIN LAWYER 11 (November 2009), <http://www.wisbar.org/AM/Template.cfm?Section=Search&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=87323> (citing WIS. STAT. § 1392).

<sup>203</sup> Jurisdictions differ regarding the order of priority for appointing a guardian or conservator. For example, the Coquille Tribe grants priority to an incapacitated person’s parent, but permits the Tribal Court to appoint someone other than the parent(s) upon a showing that the preference should be rebutted. Bushyhead, *supra* note 16; Coquille Indian Tribe, Ch. 375 – Conservatorship and Guardianship Ordinance, <http://www.coquilletribe.org/documents/375Guardianship.pdf>. The Court may appoint a “conservator and/or guardian who is most suitable and willing to serve,” and may consider factors such as “the relationship by blood or marriage of the proposed conservator and/or guardian of the proposed ward.” *Id.* In contrast, the Uniform Guardianship and Protective Proceedings Act gives a spouse priority for letters of guardianship, if the incapacitated person has not nominated a guardian or appointed a health care proxy. *Id.* (citing Unif. Guardianship & Protective Proc. Act § 5-310, 8II U.L.A. 362-63 (Supp. 2008)). In another approach, Washington permits any “suitable person over the age of eighteen years, or any parent under the age of eighteen years or, if the petition is for appointment of a professional guardian, any individual or guardianship service that meets any certification requirements established by the administrator for the courts” to be appointed guardian of the person and/or the estate of an incapacitated person.” WASH REV. CODE

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§11.88.020(1). *See also* White Mountain Apache, Probate Code, <http://www.wmat.nsn.us/Legal/Probate.html> (outlining preferences for the appointment of a guardian).

<sup>204</sup> For example, in Wisconsin, a domestic partner can consent to organ donations from the deceased partner and can authorize an autopsy of the deceased partner's body. Sweet, *supra* note 202.

<sup>205</sup> Key issues include the right of a same-sex partner to a share of intestate succession where the decedent partner dies intestate, and the right to a forced share election against a will if disinherited. For example, in Oregon, a decedent's domestic partner would be considered the decedent's "surviving spouse" for the purpose of intestate succession. As the surviving spouse, the surviving partner would take priority over the decedent's other family (other than the decedent's issue) in receiving a portion or all of the decedent's intestate estate. In Wisconsin, a surviving domestic partner has certain rights to select personal property and may be can seek the assignment of the decedent's property interest in the home the domestic partners shared. Sweet, *supra* note 202 (citing 2009 WIS. ACT 28, §§3260; 3262 (amending WIS. STAT. §§861.21; 861.33)). For an example of a BIA-approved tribal probate code, *see* Confederated Tribes of the Umatilla Indian Reservation, Inheritance Code (April 7, 2008), <http://www.umatilla.nsn.us/InheritanceCode.pdf>.

NOTE: The American Indian Probate Reform Act "may find its way into the analysis of same-sex couple spousal rights when [tribes] whose members own 'trust and restricted lands,' pass laws allowing same-sex marriage. In these cases, the AIPRA, as an Act of Congress, discriminates against same-sex spouses by employing the federal definition of spouse for intestate succession." Bushyhead, *supra* note 16 (citing 1 U.S.C. § 7; 25 U.S.C. § 2206(a)(2)).

<sup>206</sup> For example, in Wisconsin, a surviving same-sex domestic partner may, maintain a wrongful death action, receive death benefits if the deceased partner was killed as a crime victim and/or was a police officer or firefighter killed in the line of duty, receive victim compensation if the deceased partner was killed or injured while trying to prevent a crime or while assisting a law enforcement officer, and file worker's compensation death claims similar to those available to a surviving spouse. Sweet, *supra* note 202 (citing 2009 WIS. ACT 28, §§ 2159; 3269; 3357-3359).

<sup>207</sup> "Regardless of whether the decedent spouse executed a will before his/her death, the surviving spouse may still be entitled to benefits such as wage benefits, spousal allowance, and homestead rights. First, a surviving spouse has a right to recover wages earned by his/her deceased spouse but not yet paid for, in an amount not exceeding \$10,000. Second, a surviving spouse has a right to spousal allowance, which is a benefit granted by a presiding probate court when the exempt property retained by a surviving spouse is insufficient for his/her care and maintenance. Finally, a spouse retains 'probate homestead' rights to possess the (non-trust) property until his/her death without threat that the homestead will be sold to satisfy a lien or judgment against it." Bushyhead, *supra* note 16 (citing OR. REV. STAT. §652.190; OR. REV. STAT. §18.395; OR. REV. STAT. § 18.395).

<sup>208</sup> *See, e.g.*, Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300 - 106.340.

<sup>209</sup> Bushyhead, *supra* note 16.

<sup>210</sup> OR. REV. STAT. ch. 127; Bushyhead, *supra* note 16. Unless an individual designates a health care representative in an advance directive or living will (or other document valid under applicable law), tribal or state law will determine who is entitled to make those decisions. Bushyhead, *supra* note 16. Where one domestic partner is incapacitated and has a terminal condition, is permanently unconscious, etc., and does not have an advance directive or appointed health care representative, guardian, or other person authorized

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to make health care decisions, the other domestic partner would have priority to serve as the incapacitated partner's health care representative. OR. REV. STAT. §127.635.

<sup>211</sup> Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300 - 106.340.

<sup>212</sup> WASH. REV. CODE, Title 11, <http://apps.leg.wa.gov/rcw/default.aspx?cite=11.04.015>.

<sup>213</sup> 2009 WIS. ACT 28, <https://docs.legis.wisconsin.gov/2009/related/acts/28/3247>.

<sup>214</sup> CAL. PROBATE CODE, §§ 20-88; 8461; 8462; 6401; 6402; 1813.1; 1895, [http://www.leginfo.ca.gov/html/prob\\_table\\_of\\_contents.html](http://www.leginfo.ca.gov/html/prob_table_of_contents.html).

<sup>215</sup> *Id.*

<sup>216</sup> [OSCE Office for Democratic Institutions and Human Rights](http://www.osce.org/odihr/36426), *Hate Crime Laws - A Practical Guide*, at 11 (March 9, 2009), <http://www.osce.org/odihr/36426>.

<sup>217</sup> Bureau of Justice Assistance, *A Policymaker's Guide to Hate Crimes*, at ix, (November 1999), <https://www.ncjrs.gov/pdffiles1/bja/162304.pdf>.

<sup>218</sup> *Id.*

<sup>219</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 216, at 16-17.

<sup>220</sup> *Id.*, at 17. *See also A Policymaker's Guide to Hate Crimes*, *supra* note 217, at x.

<sup>221</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 216, at 17. *See also A Policymaker's Guide to Hate Crimes*, *supra* note 217, at x.

<sup>222</sup> *Id.*, at x.

<sup>223</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 216, at 17. *See also A Policymaker's Guide to Hate Crimes*, *supra* note 217, at x.

<sup>224</sup> *Id.*, at x.

<sup>225</sup> *Id.*, at 13.

<sup>226</sup> "African Americans, who constitute the single largest minority group in the Nation, are more likely to be targets of hate crimes than members of any other group. Of the nearly 8,000 hate crimes reported in 1995, almost 3,000 of them were motivated by bias against African Americans. Other typical victims are Jews, homosexuals, Muslims, and, increasingly, Asian Americans." *Id.*

<sup>227</sup> *Id.*, at 13. "A host of factors may create a climate in which people, motivated by their biases, take criminal action. Such factors include poor or uncertain economic conditions, racial stereotypes in films and on television, hate-filled discourse on talk shows or in political advertisements, the use of racial code language such as "welfare mothers" and "inner city thugs," and an individual's personal experiences with members of particular minority groups. Once a climate of hate is created, a single incident—such as the videotaped beating of Los Angeles, California, motorist Rodney King—can trigger a wave of hate crimes." *Id.* at x.

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<sup>228</sup> *Id.*, at 13.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*, at x-xi.

<sup>231</sup> *Id.*, at 13.

<sup>232</sup> *Id.*

<sup>233</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 216, at 7.

<sup>234</sup> *Id.*, at 21-22.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*, at 22.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *A Policymaker's Guide to Hate Crimes*, *supra* note 217, at ix.

<sup>242</sup> *Id.*, at 27-28. "Such opponents consider hate crime laws to be 'viewpoint discrimination' and challenge the grounds upon which the proponents of the laws rely as purely speculative. They assert, for example, that penalty enhancement cannot be justified on the grounds that injury to society is greater when a crime is motivated by bias. They claim that retaliatory crimes do not necessarily increase when crimes are bias motivated, citing examples of certain religious groups that, in accordance with the tenets of their religion, will not retaliate when attacked, and certain disabled persons who cannot retaliate. They also argue that all crimes, not only those motivated by bias, are dehumanizing and distressing to the victim; therefore, a rash of any type of crime, not just hate crime, is likely to generate community unrest and injure society as a whole." *Id.* See also Michael Shively, *Study of Literature and Legislation on Hate Crime in America*, <https://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf> for further discussion of identified strengths and weaknesses of hate crime legislation.

<sup>243</sup> Assessments should evaluate, among other questions: Are hate crimes being prosecuted? Are defendants being convicted? What are the problems in actual practice? Are potential victims and potential offenders aware of the law?

<sup>244</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 216, at 57.

<sup>245</sup> This researcher did not find any tribal statutes or court cases specifically addressing hate or bias crimes.

<sup>246</sup> Human Rights Campaign, *State Laws & Policies*, <http://www.hrc.org/resources/entry/state-laws-policies>. See also *A Policymaker's Guide to Hate Crimes*, *supra* note 217, at xiii ("Thirty-nine States have enacted laws

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against bias-motivated violence and intimidation. Nineteen States have statutes that specifically mandate the collection of hate crime data. Meanwhile, dozens of law enforcement agencies have promulgated new policies and procedures to address hate crimes.”).

<sup>247</sup> *Id.*, at 27-28. For further discussion of the hate crime legislation approaches taken by U.S. states, see Human Rights Campaign, *State Laws & Policies*, <http://www.hrc.org/resources/entry/state-laws-policies>; *Study of Literature and Legislation on Hate Crime in America*, *supra* note 242.

<sup>248</sup> *State Laws & Policies*, *supra* note 247.

<sup>249</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 216, at 16-17.

<sup>250</sup> *Id.*, at 16. “The term ‘hate crime’ or ‘bias crime’, therefore, describes a type of crime, rather than a specific offence within a penal code.” *Id.*

<sup>251</sup> *Id.*, at 16-17.

<sup>252</sup> *State Laws & Policies*, *supra* note 247. See also *A Policymaker’s Guide to Hate Crimes*, *supra* note 217, at xiii.

<sup>253</sup> *State Laws & Policies*, *supra* note 247.

<sup>254</sup> *Id.* (citing WASH. REV. CODE § 9A.36.080).

<sup>255</sup> *Id.* note 245(citing CAL. PEN. CODE § 422.76).

<sup>256</sup> Anti-Defamation League, *ADL Approach to Hate Crime Legislation*, §b - Text of ADL Model Legislation, [http://www.adl.org/99hatecrime/text\\_legis.asp](http://www.adl.org/99hatecrime/text_legis.asp).

<sup>257</sup> OR. REV. STAT. Ch. 166.

<sup>258</sup> CAL. PEN. CODE §422.56.

<sup>259</sup> WASH. REV. CODE § 9A.36.080.

<sup>260</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 216, at 38. For example, 46 states have statutes specifying race, ethnicity, and/or religion as traits identifying protected groups. Over 50% of states specify sexual orientation, gender, and/or disabilities as targets of bias or prejudice, while relatively few states specify age (27%) or political affiliation (12%). *Study of Literature and Legislation on Hate Crime in America*, *supra* note 242, at 19.

<sup>261</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 216, at 46.

<sup>262</sup> *Id.*, at 48.

<sup>263</sup> *Id.*, at 35.

<sup>264</sup> *Id.*, at 35. In addition, in some jurisdictions, “there is the additional problem that courts can only consider the offence with which the accused is indicted. Hence, a substantive hate crime indictment may not allow the court to convict of the base offence if the bias element is not proven. This is a disadvantage of substantive



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offences, and can cause prosecutors either to avoid using the hate crime laws, or to accept a guilty plea to the base offence in order to ensure the offender is convicted." *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *A Policymaker's Guide to Hate Crimes, supra note 217, at 27-28.*

<sup>267</sup> *Id.*

<sup>268</sup> Anti-Defamation League, *supra note 256.*

<sup>269</sup> OR. REV. STAT. Ch. 166.

<sup>270</sup> *A Policymaker's Guide to Hate Crimes, supra note 217, at 27-28.*

<sup>271</sup> *Id.*

<sup>272</sup> *State Laws & Policies, supra note 247 (citing ARIZ. REV. STAT. §13-701(D(15)); § 41-1750).* Arizona law defines sexual orientation as a protected group. However, sexual orientation is defined only as heterosexual or homosexual. *Id.* (citing ARIZ. REV. STAT. §13-701(D(15))).

<sup>273</sup> FLA. STAT. §775.085.

<sup>274</sup> WIS. STAT. §939.645.

<sup>275</sup> *Hate Crime Laws - A Practical Guide, supra note 216, at 31-34.*

<sup>276</sup> *Id.*, at 22-23.

<sup>277</sup> *Id.*, at 36.

<sup>278</sup> *State Laws & Policies, supra note 247 (citing ARIZ. REV. STAT. §13-701(D(15))).*

<sup>279</sup> *Id.* (citing MASS. ANN. LAWS ch. 22C, §§ 32-35).

<sup>280</sup> *Id.* (citing LA. REV. STAT. 15:1204.4).

<sup>281</sup> OR. REV. STAT. §181.550.

<sup>282</sup> FLA. STAT. §877.19.