NO. 75934-1

SUPREME COURT OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN, et al., Respondents,

v.

KING COUNTY, et al., Appellant,

v.

STATE OF WASHINGTON, Appellant,

v.

SENATOR VAL STEVENS, et al., Appellant (Intervenor).

BRIEF OF RESPONDENTS

Bradley H. Bagshaw, # 11729
Jennifer S. Divine, # 22770
Helsell Fetterman LLP
1001 Fourth Ave., # 4200
Seattle, WA 98154
(206) 292-1144

Patricia Novotny, # 13604
Nancy Sapiro, # 18751
Lisa M. Stone, # 15421
Northwest Women's Law Center
3161 Elliott Avenue, #101
Seattle, WA 98121
(206) 682-9552

Jamie D. Pedersen, # 24690
Preston Gates & Ellis LLP
925 Fourth Ave., #2900
Seattle, WA 98104
(206) 623-7580

Jennifer C. Pizer, Pro Hac Vice
Lambda Legal Defense & Education Fund
3325 Wilshire Boulevard, #1300
Los Angeles, CA 90010-1729

Attorneys for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

LAW REVIEW/JOURNAL ARTICLES

I. ISSUES IN RESPONSE TO APPELLANTS' BRIEFS

1. What legitimate or compelling state interests are served by the regulation of marriage and are they not served as well or better by allowing committed same-sex couples to marry?

2. Does Washington's constitutional guarantee of liberty mean that the State cannot deny the right to marry the person of one's choice without demonstrating that that denial is narrowly tailored to serve a compelling state interest?

3. Does Washington's constitutional guarantee of sex equality prohibit limiting marriage according to distinctions based on sex?

4. Does Washington's constitutional guarantee of equal privileges and immunities mean that same-sex couples must be granted the right to marry absent proof that their exclusion bears a natural, reasonable and just relation to the purposes of marriage?

II. STATEMENT OF FACTS

There are sixteen plaintiffs in this case, sixteen stories to tell, sixteen pleas from each of the plaintiffs for the same rights that their neighbors, friends, and siblings enjoy.

There are also eight stories to tell: of the eight lives these sixteen people have made together. The community of values, hopes, and dreams; the union of effort, successes, and failures; the intermingling of families; the commingling of resources, joys and tears; the loving interdependency that exceeds the sum of its parts.

Ultimately, there is one story to tell: the story of commitment. Whereas many lawsuits involve people brought together by random or unpredictable events, these couples appear before this Court because they have consciously, soberly and lovingly dedicated themselves to one another so long as they live.

These plaintiff couples are like any other citizens of this State. They work, they maintain homes, they care for one another, and they care for their children, their parents and other loved ones. Every day they are harmed by their inability to marry and protect their families in the same ways that heterosexual couples can.

Some have had to pay more for health insurance or doctors' and dentists' bills than they would have if married; one has paid to draw up a partnership contract unnecessary for married couples; others have paid for wills, powers of attorney and health care directives that are optional for

married couples but essential for couples not allowed the comprehensive and automatic protections of marriage. For example, one couple worries that a geriatric illness could force them to sell their home and spend down all their savings before Medicaid would help, leaving the healthier partner destitute and without her life-long home, a loss from which the law protects a legal spouse. In all of these ways, denying lesbian and gay couples the protection of our state's family law forces them to spend more money, take more risks, suffer more uncertainty and endure more hardship than other couples. CP 114; 118; 154; 169; 212; 231.

These couples are like couples everywhere, but they are also exceptional: brave enough to subject themselves to this public fight for rights others take for granted. As Judge Downing observed: "before the Court stand eight couples who credibly represent that they are ready and willing to make the right kind of commitment to partner and family for the right kind of reasons. . . . The characteristics embodied by these plaintiffs are ones that our society and the institution of marriage need more of, not less." CP 892; 900.

Two young people embark upon their life together facing both practical and psychological impediments spared their different-sex

counterparts. Michelle Esguerra and Boo Torres de Esguerra have sought in various ways to mark their commitment to one another. They have exchanged rings, Boo has added Michelle's last name to her own, and they have planned a ceremony to solemnize their commitment before family and friends. CP 90; 100.

Michelle and Boo have also taken some early steps to try and secure their financial interdependency, steps either made necessary or made more urgent because they cannot marry. Although Boo has good health insurance coverage through her employer, she is not able to cover Michelle even though the company provides complete coverage at no cost to spouses. CP 102. The expense of purchasing an individual policy is more than the young couple can afford and, as a result, Michelle lives without health insurance. *Id.* The young couple has yet to obtain wills, health care directives, and powers of attorney. CP 101. Michelle and Boo hope that misfortune does not strike before they are able to deal with these issues.

Johanna Bender and Sherri Kokx know better than most how much easier it would be if they could marry. Johanna, an attorney, and Sherri, a middle school teacher, met in 1996 and fell in love. CP 185; 176. Not

only do Johanna and Sherri enjoy the love and support of their families, they have the invaluable advantage of an insider's knowledge of their legal vulnerabilities. Thanks to Johanna's mother, a family law attorney who volunteered to help them, they were able to save the $2000 it would have cost to hire an attorney to complete the adoptions of the two children they chose to have together. CP 184-185; 176. Still, in completing the adoptions, they have had to endure the State's intrusion into their lives — hiring a social worker to inquire into their parental fitness, submitting to criminal background checks and having physicians attest to their mental stability — all things that married people avoid entirely. *Id.* *See* RCW § 26.26.101(2)(e) (spouse who consents to birth via assisted reproduction is the child's parent without need for state action or approval).

Michael and David Serkin-Poole are waiting, too, to be married in their home state, among their friends and family, including their three children. CP 231-232. They are waiting to use the rings they bought and now keep in a box. They have been waiting for 23 years, since they first said "I love you" almost in unison. *Id.* Until the time comes when they can marry, they have done what they can to legally protect themselves and their children by paying attorneys thousands of dollars to draw up

documents regarding inheritance and survival rights, co-partnership agreements, co-parenting agreements, and medical directives. CP 232.

David and Michael are dedicated parents. They have opened their hearts and lives to three children who very much need them, developmentally disabled children whom David and Michael have carefully nurtured and guided. CP 229-230. As they tell it, they are the ones who have been blessed. What others consider sacrifices, the Serkin-Pooles have seen as privileges, as they have worked to ensure that their children receive the best of care. Their experience has also given them acute insight into what commitment means, what family means, simply: "people who love each other unconditionally, no matter what." CP 230.

David Shull and Peter Ilgenfritz would agree with that definition. To that, they would add their strong religious faith that God's love likewise is unconditional. David and Peter celebrated their religious marriage ten years ago in Chicago at St. Pauls United Church of Christ and they now lead a Christian community in Seattle as co-pastors of the University Congregational United Church of Christ. CP 209. From their own experience as well as from their pastoral work, Peter and David know too well the pain of exclusion. Though married in a service that was in

every other way like a traditional Christian ceremony, and though Peter and David solemnize the marriages of others, they cannot share in the full legal status conferred upon different-sex couples when they make these same public and faith-based declarations of commitment.

Janet Helson, Betty Lundquist, and their children also want to be treated as equals. Together since their first date, which they joke lasted five weeks (as they met trekking in Nepal), Janet and Betty have struggled against the same exclusions, anxieties, and indignities as the other plaintiffs. They are raising two children, after having fostered four teenagers. CP 163. For the purpose of being licensed to care for children in need, the state treated Janet and Betty as if they were married. CP 162. Not so some of the other foster parents in training, whose expressions of anti-gay animosity drove Betty from the class in tears, a treatment she and Janet believe she would have been spared if the state accorded their relationship an equal status. CP 162-163. Fortunately, their own extended families have embraced their relationship. CP 165.

Janet and Betty are also lucky to have the knowledge and means to cobble together what protections they can to secure their own family against misfortune. CP 167-168. They know these efforts fall far short of

the security and stability marriage provides, not only for each other, but for their children. They believe marriage would also offer a buffer for their children against hostility and misunderstanding. It would give the kids "something solid to fall back on," a sense of acceptance and belonging rather than the stigma of knowing that their "family is not valued by our government — that they are not equals with the same rights as everyone else." CP 166-167.

Heather Andersen and Leslie Christian, like Janet and Betty, consider themselves fortunate. CP 244. They have made a good life together over the past fourteen years and they have the knowledge and financial means to secure the limited legal protections available to them. CP 261. But these protections have not shielded them from the discrimination or legal difficulties caused by their inability to marry. CP 245. They have become accustomed to paying more for services than married couples. CP 245-246. Leslie cannot cover Heather through her employer-sponsored health insurance plan and, as a result, they must pay for an individual policy for Heather. CP 245. Health problems are of increasing concern for these two women. In their fifties, they worry what would happen if either of them needed medical care while traveling —

what if they were not recognized as each other's next of kin and were not allowed to make medical decisions for each other? CP 260-261.

Mala Nagarajan and Vega Subramaniam received a frightening lesson in the limits of privately-designed efforts to protect themselves when Vega was hospitalized and the hospital staff treated Mala, Vega's designated health care decision-maker, with disdain. CP 276. Similarly, when Vega followed Mala to Olympia to take a better job, she was denied unemployment benefits and was uninsured until she got a job because she could not enroll on Mala's health plan. CP 155. When they purchased their home, the process involved numerous additional expenses because they were not considered spouses. They had an attorney prepare powers of attorney, domestic partnership agreements, and mutual wills. But Mala and Vega realize that even if these directives are followed, the inheritance and property laws will not treat them equally because they are not legally married. CP 275.

Mala and Vega also understand, in a way others may not, the historical changes in marriage. Although they both were raised in the United States, their families are from India, where Mala's parents married pursuant to arrangement by their families. CP 146; 156; 270. Today,

Mala and her siblings have abandoned the tradition of arranged marriage in favor of marriage for love, a new tradition Vega and Mala celebrated in their 1998 Hindu wedding ceremony. CP 156; 273.

When Beth Reis and Barb Steele invited 175 family members and friends to celebrate 20 years of their mutual commitment, they drew on yet other traditions. CP 113. They stood under a chuppah, in honor of Beth's Jewish heritage, and told the assemblage that "[I]n [Barb's] early African-American tradition, in the days before the law recognized marriages between slaves, the community recognized a union when the couple jumped the broom together." Asking the blessings of their family and friends, Barb and Beth "jumped the broom" together. *Id.*

Though the ceremony was Beth and Barb's most public acknowledgement of their commitment, it was hardly the first. Beth and Barb exchanged private vows with one another in 1977 on the shoulder of a highway with Barb's children asleep in the car's back seat. CP 112-113. They had met not long before, now 27 years ago, drawn to each other initially because of a shared devotion to their respective grandmothers. CP 111. For Barb and Beth, all the ways they are different, including some that society has burdened with enormous significance, such as race,

religion, and class, are nothing because, in each other, they have found their home. CP 111-112.

Without that bedrock, they likely could not have overcome the struggles presented them these past 26 years. While bearing both greater financial and psychological costs than their married counterparts, Beth and Barb have raised their children, cared for their 14 grandchildren, cared for their ill and aging parents, and cared for and supported each other. CP 112; 119. They have worried, when a child fell ill, that one of them would be excluded from the hospital room, especially since they could not afford adoption. CP 116. They have done what they could to secure protections for themselves, but this incomplete and hard-won security has not erased the memories of exclusion, anxiety, and humiliation. They mourn Beth's forced absence from participating fully in the school lives of their children given the high value she places on education. CP 117. They still burn with resentment for the forms they have had to complete as "unmarried" persons. CP 114-115.

Now they stand at the threshold of retirement, knowing that they will pay more for less security than other couples likewise facing end-of-life issues. Because they cannot marry, they will pay extra for

supplemental insurance. CP 115. Because they cannot marry, Beth will be denied the "Death in Service Survivor's Benefit" she should receive if Barb, a state employee, dies before her. And because they cannot marry, if Beth dies first, Barb will be denied the Social Security pension earned by Beth that normally is paid to a surviving spouse. *Id.*

Barb and Beth have seen the changes time can bring — in themselves, as they finally leave behind the fear of "making a fuss" by asserting their own rights, and in their families, as the testament of their lived life has finally brought everyone around. Now they wish to marry legally, this time with the State's sanction, not only for themselves, but for the sake of the young couples, and their families, coming behind them. CP 113-114. Beth and Barb would like to spare those couples the pain and loss and humiliation of living a second class life.

More than one hundred years ago, a lone Supreme Court justice, dissenting from the majority's approval of "separate but equal" railway cars, declared that our law "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S. Ct. 1138, 1146, 41 L. Ed. 256, 263 (1896) (Harlan, J., dissenting). As the plaintiffs in this case demonstrate, Justice Harlan's vision remains aspirational. The love

these couples feel for one another and the commitments they have made for the sake of their love and their families are, according to the State, worth less than the love and commitments of different-sex couples. Consequently, these families occupy a second-class status and are unjustifiably deprived of the security, protections, recognition, and basic dignity other committed couples take for granted.

III. SUMMARY OF ARGUMENT[1]

This case engages the court in an interrogation of civil marriage: what it is and why it is. However, marriage itself is not challenged. The State misapprehends this important distinction. This case does not demand that the State justify marriage; that is, justify regulating the private lives of its citizens in the way marriage does. These plaintiffs want to marry. As Judge Downing recognized, they do not seek to dishonor, much less destroy, the institution of civil marriage. CP 900. But the denial of marriage to same-sex couples must be justified by an explanation of how that denial serves the purpose of civil marriage. That explanation

[1] For ease of reference, the respondents will refer to all appellants collectively as the "State" unless otherwise indicated.

then must be measured against the state constitutional standards that protect our rights to liberty and equality.

First, Washington guarantees liberty to its citizens, and liberty includes the fundamental right to marry the person of one's choice. The State cannot hide behind the dictionary as a defense to plaintiffs' challenge. Rather, civil marriage is defined by the State's vast regulatory scheme and by what state interests those regulations serve and protect. It is that definition, not the dictionary's, that concerns our Constitution, and same-sex couples satisfy that definition just as different-sex couples do.

Second, Washington guarantees to its citizens that their government will treat them equally without regard to sex. Yet the state's Defense of Marriage Act (hereafter "DOMA") predicates marriage eligibility on distinctions drawn according to sex.[2] This discrimination offends the Equal Rights Amendment, Const. art. XXXI, § 1, no less because it discriminates equally against men and women. The right to equal treatment is a right of individuals, not groups. The harm to

---

[2] The Washington Legislature passed DOMA in 1998, explicitly excluding same-sex couples from entering into civil marriage in this state.

individuals from illegal gender stereotyping is in no way cured by violating women's and men's rights "equally."

Third, Washington citizens have a constitutional right to be treated equally without regard to distinctions bearing no relevant, just, and natural relationship to the legitimate purposes of state regulation. Nevertheless, the State claims it may discriminate because the purpose of marriage is heterosexual procreation and childrearing. However, the purpose of civil marriage is not solely or primarily procreation, as Washington law compellingly reveals. Nor, strictly speaking, is the purpose of marriage at issue here. Rather, the state must establish what purpose excluding same-sex couples serves. That is, even if procreation were the sole or primary purpose of marriage, the State must show how denying same-sex couples the right to marry encourages procreation by different-sex couples and benefits their children. The State simply cannot do so.

Accordingly, for these three reasons, this Court should affirm Judges Downing and Hicks and order the state to issue marriage licenses to these couples.

IV. ARGUMENT

A. Denying Same-Sex Couples The Right To Marry Violates Washington's Due Process Clause

1. Marriage is a Fundamental Right

Marriage exists as a unique juncture where private life takes on public meaning. As a private commitment, it is "older than the Bill of Rights." *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed.2d 510, 516 (1965). As a legal instrument, civil marriage controls the terms on which the state, with its myriad regulations of person and property, and the family meet.

Washington's territorial court was the first to recognize the importance of marriage to society, as well as to the parties. *Maynard v. Valentine*, 2 Wash.Terr. 3, 12-13, 3 P. 195 (1880). Ironically, the case upheld the Legislature's power to dissolve the marriage of "Doc" Maynard after he abandoned his wife and children. *See* CP 891. The United States Supreme Court affirmed the decision and, like the Washington Court, honored marriage in the breach, affirming the importance of marriage to society even when it lacked a central precept: permanence. *Maynard v. Hill*, 125 U.S. 190, 205, 8 S. Ct. 723, 726, 31 L. Ed. 654, 657 (1888).

Subsequently, both state and federal courts have mapped the contours of marriage, recognizing it as a fundamental right that the state may not abridge absent a compelling interest served with precision by narrowly-tailored regulation. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed.2d 64 (1987) (prison inmates may not be denied the right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed.2d 618 (1978) (right to marry may not be denied to father in default of child support obligations); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed.2d 1010 (1967) (right to marry may not be denied to interracial couples); *Levinson v. Horse Racing Comm'n*, 48 Wn. App. 822, 740 P.2d 898 (1987) (depriving wife of racing license because of husband's misdeeds impairs fundamental right to marry); *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948) (ban on interracial marriage offends constitutional right); *see also Goodridge v. Department of Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (right to marry extends to same-sex couples).

In Washington, this right resides in our constitutional guarantees of liberty, privacy, and intimate association. Const. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of

law."); Const. art. I § 7 ("No person shall be disturbed in his private affairs . . . without authority of law."). Plaintiffs make no federal constitutional claims. Importantly, they look for relief to Washington's Constitution, as "[s]tate constitutions were originally intended to be the primary devices to protect individual rights." *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring). The histories of the federal and State Constitutions "clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty." *State v. Coe*, 101 Wn.2d 364, 374, 679 P.2d 353 (1984).[3] Because there is no dispositive federal law on the question raised here, there is no need to examine the criteria for whether our Constitution "should be considered as extending broader rights" than the U.S. Constitution. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Rather, by first resort to the Washington Constitution, we

---

[3] *See generally* Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 441 (1984).

"develop a body of independent jurisprudence." *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).[4]

2. Plaintiffs Seek Marriage, Not "Same-Sex Marriage"

As a state and a nation, we embrace no more fundamental principle than liberty, which encompasses the right to marry. Yet the State argues that this right does not extend to plaintiffs in this case because it has not extended to them in the past. The State claims it cannot find in the dictionary or in "tradition" marriages like those formed by these couples. But "tradition is a living thing," *Poe v. Ullman,* 367 U.S. 497, 542, 81 S. Ct. 1752, 1776, 6 L. Ed.2d 989, 1019 (1961) (Harlan, J., dissenting), and marriage is a living thing, and dictionaries reflect the world, they do not create it.[5] We are reminded by Judge Downing that our constitutional framers knew that the document they authored must necessarily live and

---

[4] Plaintiffs do, however, concur with the *Castle* plaintiffs that a standard *Gunwall* analysis leads to the conclusion that an independent interpretation of the Washington Constitution is required.

[5] Dictionaries are in fact adapting. *See, e.g.*, The American Heritage Dictionary, providing a definition of marriage as: "4. A union between two persons having the customary but usually not the legal force of marriage: a same-sex marriage." The American Heritage Dictionary of the English Language (4th ed. 2000), available at http://www.bartleby.com/61/2/M0120200.html (last visited 11/21/2004). Another dictionary defines marriage as "the legal or religious union of two people." Canadian Oxford Dictionary, 947 (2d ed. 2004).

breathe, as the only certainty is the fact of change itself. CP 878. Accordingly, the framers insisted that "[a] frequent recurrence to fundamental principles is essential to the security of the individual right and the perpetuity of free government." Const. art. I, § 32; CP 878, 879.

Thus, the State cannot evade the constitutionally-required analysis by mischaracterizing plaintiffs' claim as a request for a new species of marriage called "same-sex marriage." These plaintiffs want marriage, not "same-sex marriage," just as the Lovings wanted marriage, not "interracial marriage." *See generally Loving*, 388 U.S. 1. At issue here is the right of each plaintiff to join in marriage with the person of his or her choice: David Serkin-Poole is denied the right to marry if he may exercise the right only by abandoning Michael, his partner of 23 years and the man with whom he has raised three children.

The State asks this Court to make the same mistake made in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed.2d 140 (1986), where the Court upheld a Georgia statute criminalizing sodomy for all consenting adults after characterizing the question presented as whether liberty protects the right to "homosexual sodomy." *Id.* at 191. Almost 20 years later, reversing itself, the Court recognized it had failed

"to appreciate the extent of the liberty at stake." *Lawrence v. Texas*, 539 U.S. 558, 567, 123 S. Ct. 2472, 2478, 156 L. Ed.2d 508, 518 (2003). The *Lawrence* Court restored to the analysis the recognition that sexual intimacy, like marriage, procreation, contraception, family relationships, child rearing and education occupies a critical role in what it means to be free.

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Lawrence, 539 U.S. at 574 (*quoting Southeastern Pa. v. Casey*, 505 U.S. 833, 851, 112 S. Ct. 2791, 2807, 120 L. Ed.2d 674, 698 (1992)). *Lawrence* reminds us that the framers did not presume to know "the components of liberty in its manifold possibilities. . . . They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 578-579.

The State ignores *Lawrence* in favor of *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed.2d 772 (1997), and urges blind adherence to "tradition" as a substitute for analysis.[6] Br. County, at 24-25. If this static view of tradition defined our liberty, however, there would be no protection for the use of contraceptives by unmarried couples, *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed.2d 349 (1972); or even by married couples, *Griswold*, 381 U.S. 479; there would be no freedom from corporal punishment in schools, *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed.2d 711 (1977); nor from an arbitrary transfer from prison to psychiatric institution, *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed.2d 552 (1980); no recognition for the right to raise one's "illegitimate" children, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed.2d 551 (1972); nor for the right to terminate a pregnancy, *Casey*, 505 U.S. 833; nor for the right to engage in private consensual sexual intimacy without state interference, *Lawrence*, 539 U.S.

---

[6] A resort to tradition also raises the difficult questions of whose tradition and from what time period. Mala's parents, for example, come from a tradition of arranged marriages that most in the United States have gladly abandoned. CP 156. As Justice White observed, "[w]hat the deeply rooted traditions of the country are is arguable." *Moore v. East Cleveland*, 431 U.S. 494, 549, 97 S. Ct. 1932, 52 L. Ed.2d 531 (1977) (White, J., dissenting).

558. Yet liberty has been found to protect all these departures from "tradition."

Tradition informs our constitutional liberty, but does not confine it. On the contrary,

> "[l]iberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571, 92 S. Ct. 2701, 2706, 33 L. Ed.2d 548, 557 (1972).

Lawrence, decided last year, illustrates better than *Glucksberg* how analysis of a liberty interest engages both tradition and experience, reminding us that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579. That is why to deny plaintiffs the right to marry, the State must explain what it is, beyond the simple fact of historical repetition, that makes marriage a fundamental right, and how that must of necessity exclude same-sex couples. Even then, the State must show why excluding gay and lesbian couples from marriage serves a

compelling state purpose and why keeping gay and lesbian people out is central to that purpose.

3. The Essential Meaning Of Marriage

Judge Downing explained that "[t]o 'marry' means to join together in a close and permanent way." CP 877. Movingly, he described the union that these couples have already formed: the lived commitment, the private vows, the religious solemnizations. *Id.* The plaintiffs illustrate why marriage has been described "as creating the most important relation in life." *Maynard v. Hill*, 125 U.S. at 205. Most famously, the United States Supreme Court declared:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 U.S. at 486. In *Griswold*, the Court protected a married couple's decision to avoid procreation through contraception. *Id.* at 485-486. It was obvious then, and is more obvious now, that marriage

encompasses and accomplishes a great many purposes, only one of which, and only for some people, may be procreation.[7]

Twenty years later, Justice O'Connor explained the many tangible and intangible ways "inmate marriages" are like other marriages:

> [They] are expressions of emotional support and public commitment . . . [and] may be an exercise of religious faith as well as an expression of personal dedication. . . . [M]ost inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock).

Turner, 482 U.S. at 95-96. Marriage has meanings that are private and public. It is the public meaning that concerns us here.

Society uses marriage to satisfy its need for the orderly regulation of property and persons. When two individuals declare themselves legally "next of kin" to one another, they opt-in to a vast regulatory scheme

---

[7] Civil marriage has always had many purposes, and those purposes have changed as family needs have changed. Explains expert historian Nancy Cott, "many features of modern marriage, which we today take for granted, were very much resisted as they were coming into being, and were viewed by opponents as threatening to destroy the institution of marriage itself." CP 80.

through which the state achieves stability, order, and clarity of interpersonal rights and obligations. Thus, in one very real sense, the meaning of civil marriage can be found in the state's regulatory scheme: in the 423 state statutes that grant rights or impose duties depending, at least in part, on whether one is married.[8]

Through marriage, the state encourages exclusive and permanent commitment. RCW § 26.04.020(1)(a) (individuals may marry only one other person); RCW § 26.09.03 (marriage cannot be dissolved without the state's sanction). With the State's support, marriage enables the private, mutual caretaking efforts of couples, relieving the state of that work.[9]

---

[8] *See* The RCW Project 2004, available at http://www.lmaw.org/TheRCWProject2004.xls (last visited 9/24/04). The state-regulated status of civil marriage is also the gateway to over 1,100 federal benefits and burdens, for example, deductions and rates for income taxation and qualification for Social Security benefits. U.S. General Accounting Office, Defense of Marriage Act, GAO-04-353R (January 23, 2004) (report calculating 1,138 federal statutes that distinguish rights, benefits, and obligations based on marital status), available at http://www.gao.gov/new.items/d04353r.pdf; CP 76 (Cott Decl.).

[9] *See, e.g.*, RCW § 7.36.020 (spouse has right to writ of habeas corpus to enforce rights of or protect disabled or incompetent spouse); RCW § 26.20.035 (gross misdemeanor not to provide support to spouse if able); RCW § 49.12.270 (employee entitled to sick leave may use leave to care for spouse with serious or emergency health condition); RCW § 74.20.230 (spouse responsible for child support of jointly adopted children); RCW § 74.20.240 (court has power to compel child support by spouse for adopted children receiving public assistance).

Many of the obligations created through marriage endure beyond death and dissolution.[10]

The state makes use of the economies achieved through marriage by reducing entitlement to certain public benefits for married couples. Where income is important to distribution of financial aid, there exist different scales for those who are married and those who are not.[11] Through marriage, the state also secures to third parties the obligations of individuals by looking to the community created by the married couple.[12]

---

[10] RCW § 26.090.040 (courts have authority to declare a marriage invalid and to provide for maintenance, a parenting plan, and a division of property); RCW § 2.10.144 (spouse entitled to public pension benefits if public [judicial] employee dies before retirement); RCW § 48.20.490 (spouse has right to continue disability insurance coverage after termination of marriage without physical); RCW § 11.28.030 (surviving spouse entitled to letters testamentary to administer community property).

[11] *See* RCW § 6.27 (rules governing garnishment); RCW § 70.47.020 (eligibility for a subsidy in the state Basic Health Plan); and RCW § 79A.05.064 (eligibility for senior citizen campsite rental discounts). *See also* RCW § 6.15.050 (personal property exemption limited if spouse has prior bankruptcy); RCW § 42.17.180 (employers of registered lobbyists must report gifts to immediate family, including spouses, of public officials); RCW § 43.20B.430 (if able, residents of residential rehabilitation centers must pay for care; notice and finding of responsibility to spouse); RCW § 71.05.100 (spouse of committed person responsible for treatment costs).

[12] *See, e.g., deElche v. Jacobsen*, 95 Wn.2d 237, 245, 622 P.2d 835 (1980) ("Torts which can properly be said to be done in the management of community business, or for the benefit of the community, will remain community torts with the community and the tortfeasor separately liable."). *See also* RCW § 36.17.024 (committees setting county officials' salaries may not include spouses of any county officials); RCW § 67.70.180 (spouses of lottery commission members, directors, or employees cannot buy lottery tickets); RCW § 26.26.720 (husbands of wives who give birth by assisted reproduction have only limited rights to challenge paternity).

In return, the state confers on the married couple measures designed to protect the family unit.[13]

In short, not only does civil marriage mark the transition from "friends" to "family" and give public notice of that change, it also marks entry into the legal framework by which society manages both intra-familial duties and transactions between the family and third parties. These duties and protections help couples share the burdens of elderly parents, growing children, financial pressures and uncertainty. As an instrument of the state, marriage serves purposes as diverse as today's families' lives, from mundane tasks such as obtaining an absentee ballot for one's spouse to the most profound end-of-life decisions. While every married couple builds their relationship according to their own private design, it is the state-supported and enforced mutuality of commitment and caretaking that constitutes the fundamental right.

---

[13] *See, e.g.*, RCW § 5.60.060 (marital privilege); RCW § 4.20.010 (wrongful death claim benefits spouse).

4. The State Relies on an Outdated Tradition of Marriage That is Irrelevant to Today's Society and Families

The State ignores what marriage is in favor of what it thinks marriage was, claiming that marriage, unlike everything else in the world, never changes. However, the State misreads the past and ignores the present. Marriage as a cultural and sometimes religious practice pre-exists the state. In the most basic sense, the "right to marry" means the state may not interfere with an individual's participation in these cultural and religious practices, in the same way the state cannot, without adequate justification, interfere with the right to have children or the right to travel or the right to sexual privacy. However, unlike these rights, the right to marry also engages the state as an active party to individual exercise of the right, for purposes of the state's regulation of each individual's property and person. Civil marriage is an instrument of the state, built atop private relationships; as a right, it must be available to all who fulfill the state's purposes.

Historical examples of this intersection between family and state can be found in common law marriage and in adoption. In both cases, the state "colonized" a common practice as the means to bring order to

property relationships. Early America, in contrast to England, needed common law marriage because of "poor recordkeeping and widespread ownership of land." Friedman, Law in America (Modern Library, 2004), at 61. Similarly, adoption became a legal instrument to ensure inheritance rights. No one needed the state's permission to take in an orphan child to love as one's own: what was needed was recognition of the relationship for property interest purposes. *Id.* Finally, divorce too played a role in ascertaining who owned what and who owed what to whom, cutting off some and embracing others, with clarity if also sometimes cruelty. *See, e.g., Maynard v. Hill,* 125 U.S. 190.

Another useful history lesson can be found in the treatment of slaves and freed former slaves *vis-a-vis* marriage. Slaves were denied the legal right to marry, though they could form familial relationships and hold their own ceremonies (*e.g.*, "jump the broom"). Thus, slaves were denied access to the state's definition of "family," with the rights and duties attendant to it, and thereby denied an aspect of their essential humanity: the right to define one's own family.[14]

---

[14] As Professor Cott explains, at one time most states banned interracial marriage and most authorities thought that a ban on interracial marriage was "not only correct but also

All of this crucial context gets lost in the State's simplistic view of history.[15] From Washington's territorial days, civil marriage has been a multi-faceted and evolving institution, with two constants: the fusing of personal commitment with public consequences, giving legal effect to the choice of whom to make "next of kin."

Not only does the State ignore the real tradition of marriage, it ignores how that tradition has changed. According to the State, marriage is a fundamental right because it is "the logical predicate" of "procreation, childbirth, abortion, and child-rearing." Br. County, at 29. In America, at least, this has never been true: the right to marry has never turned on whether or how one becomes a parent. It is no accident that the U.S. Supreme Court extolled the virtues of marriage by way of upholding the right of married couples not to procreate. *Griswold,* 381 U.S. 479. It is

---

an intrinsic part of marriage law." CP 82. Those laws were nevertheless struck down as unconstitutional, and today "virtually no one in the United States questions the legal right of individuals seen as racially different to marry one another." *Id.* at 83. Interestingly, although the Washington Territory restricted marriage along race-based lines for a short while (1855-1868), those laws were repealed twenty years before statehood. Washington State has never banned interracial marriage. *Id.* at 82.

[15] Consistent with urging this Court to make the same conceptual errors made by the U.S. Supreme Court in *Bowers v. Hardwick*, the State likewise advocates for the embrace of similarly mistaken historiography. See *Lawrence*, 539 U.S. at 571, citing William N. Eskridge, *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 656 (1999).

true that at one time, the state actively organized the intimate lives of its citizens in a manner that unified sexual activity, childbearing, and childrearing in marriage. Sexual activity outside marriage was criminal. Nonprocreative sex was illegal. Tort actions sounded for interference by third parties in the relationship between spouses. Children born outside marriage were stigmatized and deprived of the full support of their parents and the state. This is the marriage tradition the State invokes in defense of DOMA, refusing to acknowledge that the state no longer regulates consistent with this tradition.

Rather, and in no small degree because of society's expanded concept of what liberty means, the state lets people organize their own family lives and no longer enforces marriage as the exclusive location of sexual intimacy, parenting, or mutual interdependency and caretaking. *See generally* CP 74-86. The state no longer polices nonmarital sexual intimacy, and that intimacy occurs amidst improved birth control methods and constitutional limits on state control over sex and reproduction. People can and do have sex with little or no risk of procreating. They also can and do reproduce without having sex, thanks to an array of reproductive technologies. They may pursue parenthood with partners or

singly. In short, people may choose to have sex or not, to have children or not, to parent or not, whether married or not.[16]

Marriage has changed and is changing and will continue to change. "[T]he hallmarks of the marital relationship" to which plaintiffs aspire, the essence of marriage, are those identified in *Griswold* and *Turner:* "a supportive, committed, spiritually significant marriage with government benefits and property rights." CP 881. The sex of the spouses, their reproductive capacity, and whether or not they have children do not define marriage today. When the State invokes a tradition of marriage and of marriage regulation that is both inaccurate and outdated, it ignores the proper constitutional analysis of liberty set forth in *Lawrence.* The State

---

[16] Therefore, what the Court of Appeals thirty years ago in *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974) described as "exceptional situations," *i.e.*, those where unmarried people have children or married people do not, are not exceptional today. According to the 2000 U.S. Census, about 30 percent of married couples are childless. Forty percent of unmarried cohabiting couples have children under 18, *id.*, and over 16 percent of U.S. households with children are headed by single parents. U.S. Census Bureau, Special Reports, Households and Families: 2000 (issued Sept. 2001). Many people have children through adoption: the 2000 Census reported 1.6 million children under age 18 in adopted households. And reproductive technology, virtually unheard of thirty years ago, is now routinely used by would-be parents, married or not, coupled or not, straight or gay. Perhaps most "exceptional" to the *Singer* court would be the fact that 24 percent of same-sex couples in Washington have children. ***Id.*** A recent study estimated that nationwide, at least 2.6 million gay or lesbian couples live in households with children under age 18. Put another way, research estimates that the total number of children nationwide living with at least one gay parent ranges from six to 14 million. Margaret Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-parents*, 49 VILL. L. REV. 363 (2004).

takes the practice or "tradition" of marriage and divorces it from its rationale, its substance. *See Michael H. v. Gerald D.,* 491 U.S. 110, 140-141, 109 S. Ct. 2333, 2351, 105 L. Ed.2d 91, 117 (1989) (Brennan, J., dissenting). When that substance is restored to the analysis, the real meaning of marriage is revealed. It is that marriage right plaintiffs seek and to which they are entitled, not the right to "same-sex marriage."

5. Same-Sex Couples Are Entitled To Marry For The Same Reasons As Different-Sex Couples

Contrary to the State's assertion, extending marriage to same-sex couples does not deprive marriage of its definition or render all limitations on marriage constitutionally suspect. Br. County, at 23-24. Actually, as Judge Downing observed, marriage is threatened, if at all, from within, not by the plaintiff couples. CP 892 (Order). Not one of the plaintiff couples seeks the right to marry multiple partners, or their cousins, so the State's arguments are misplaced, as each restriction on marriage must be examined on its own merits. Even casual consideration suggests possible reasons for limiting marriage to two people. In addition to the potential impracticality of having multiple decisionmakers in a crisis, it has been held that polygamous marriage, in practice, if not theory, exploits and oppresses women. *Reynolds v. U. S.,* 98 U.S. 145, 166, 25 L.Ed. 244

(1878) (polygamy leads to the patriarchal principle). Similarly, it can be argued that first cousins should be prohibited from intermarrying for the many reasons that support incest laws, the many reasons that intra-family sexual relations trouble and undermine the family unit. Finally, restrictions on the underaged are grounded in solicitude for those whose judgment has yet to mature, just as we protect minors from sexual exploitation.

Of course, none of those cases is before this Court. Each of these plaintiffs' right to marry the one person who, to him or her, is "irreplaceable," *Perez,* 32 Cal.2d at 725, remains unshaken by the prospect of cases about other people: the State must have a compelling interest to deny marriage to same-sex couples and must narrowly tailor its regulation to that interest. *Levinson,* 48 Wn. App. at 824-25 (quoting *Zablocki,* 434 U.S. at 388).

Moreover, not only do the State's "slippery slope" arguments fail to frighten, as intended, they ignore a critical point. DOMA denies to gays and lesbians the right to marry because of who they are. As a nation, we embrace, sometimes slowly, but always surely, the belief that it is wrong to exclude people just because they are different. That is what DOMA

does to the community of lesbians and gay men. Indeed, as argued below, the State cannot even justify this deprivation under minimal scrutiny. (*See* Section IV C(2), *infra*.)

B. Preventing Couples From Marrying Solely on the Basis of Sex Violates Washington's Equal Rights Amendment

1. Washington Places the Highest Value on Equality of the Sexes

Each state, while enjoying the benefits of federation and national unity, defines itself culturally in ways as distinct and unique as its geography. One of Washington's claims to distinction is its early and ongoing embrace of sex equality, evident in both policy and practice. Washington has long been a national leader in gender equality, both before and after passage of the state ERA. Women in Washington got the franchise in 1910, a decade before the country as a whole. Const. art. VI, § 1. In 1970, Washington became the first state to legalize abortion by popular referendum. RCW § 9.02.060; RCW § 9.02.070. In 1991, again by popular referendum, the right of Washington's women to make their own reproductive choices was codified. RCW § 9.02.100. Our parenting laws assiduously view parents as equally obligated and equally entitled —

without regard to sex — in matters relating to their children. *See, e.g.*, RCW § 26.09.002-285; CP 602.

Our court adopted strict scrutiny for sex classifications under our privileges and immunities clause at a time when the federal court was still analyzing them under the rational basis test. *Hanson v. Hutt*, 83 Wn.2d 195, 201, 517 P.2d 599 (1973) (superseded by ERA). And since 1972, our Constitution has flatly declared that "equality of rights and responsibilities under the law shall not be denied or abridged on account of sex." Const. art. XXXI, § 1. As both cause and consequence of these policies, women in Washington enjoy a degree of well-being, autonomy, and public presence almost unparalleled in the nation.[17]

2. The ERA Mandates Equality of the Sexes

It is, then, no surprise that of the 20 states with constitutional sex equality guarantees,[18] Washington's has been implemented with particular vigor. Our ERA absolutely prohibits discrimination on the basis of sex

---

[17] Caiazza, et al., Women's Economic Status in the States, Institute for Women's Policy Research, http://www.iwpr.org/States2004/rankings.htm (last visited 10/25/04).

[18] Gladstone, Equal Rights Amendments: State Provisions, Congressional Research Service, The Library of Congress (Updated August 23, 2004) (http://www.house.gov/maloney/issues/era/082304crsStateERAs.pdf).

and is not subject to even the narrow exceptions permitted under traditional equal protection analysis. *Guard v. Jackson*, 132 Wn.2d 660, 664, 940 P.2d 642 (1997). No state interest, "no matter how compelling," justifies the sacrifice of this equality. *SW Wash. Ch., Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wn.2d 109, 127, 667 P.2d 1092 (1983), *citing Darrin v. Gould*, 85 Wn.2d 859, 872, 540 P.2d 882 (1975).[19] Washington's commitment to sex equality lies at the heart of this case.

3. DOMA Violates the ERA and Furthers Inequality and Sex Discrimination

DOMA violates the ERA. It permits or prohibits individuals to marry based upon their sex. The ERA forbids such discrimination unless the statute falls within one of two very narrow exceptions: the physical difference exception or the actual equality exception. DOMA satisfies neither.

---

[19] Washington courts apply a particularly stringent standard when testing sex-based classifications. *See* Paul Benjamin Linton, Emerging Issues in State Constitutional Law, *State Equal Rights Amendments: Making a Difference or Making a Statement*, 70 TEMPLE L. REV. 907, 911-16 (1997). In contrast to Washington's "absolute bar" standard, other states and the federal courts apply the more lenient intermediate or strict scrutiny tests to ERA claims. *Id.; see also* Comment, *Washington's Equal Rights Amendment: It Says What It Means and It Means What It Says*, 8 U. PUGET SOUND L. REV. 461, 484 (1985).

a) DOMA Impermissibly Discriminates on the Basis of Sex

Washington's marriage statute provides that "[m]arriage is a civil contract between a male and a female," RCW § 26.04.010(1), "and prohibits marriage [w]hen the parties are persons other than a male and a female." RCW § 26.040.020(1)(c). The statute plainly restricts the right to marry based on the sex of an individual. If Beth Reis were a man, she could marry Barb, her beloved partner of 27 years, but because she is a woman, she may not. The sole reason for this prohibition is Beth's sex. *See Goodridge*, 440 Mass. at 345-346, 798 N.E.2d at 971 (2003) (Greaney, J., concurring); *Baker v. Vermont*, 170 Vt. 194, 252-253, 744 A.2d 864, 904-906 (1999) (Johnson, J., concurring); *Baehr v. Lewin*, 74 Haw. 530, 558 n.17, 852 P.2d 44 (1993).

The State concedes that DOMA classifies by sex but argues that it does not discriminate by sex because the restriction applies equally to males and to females. Br. County, at 49; Br. State, at 43-45; Br.

Intervenors, at 48-49.[20] This spurious logic was rejected decades ago by the U.S. Supreme Court when it struck down a law restricting the right to marry on the basis of race, though the law treated the races equally. *Loving*, 388 U.S. 1. Though Virginia prohibited both Richard, who was white, and Mildred, who was black, from marrying each other, the Supreme Court recognized that predicating the right to marry on "distinctions drawn according to race" denied both Mildred and Richard the equality guaranteed to them by the equal protection clause. *Id.* at 11; *see also Baehr*, 74 Haw. 530 at 569-71, 852 P.2d at 65-68 (applying *Loving's* analysis to sex). In the same way, DOMA is unconstitutional because it limits the right to marry based on distinctions drawn according to sex.

The State tries to distinguish *Loving* by arguing that the discrimination in that case was invidious, while here it is not. Br. State, at 45-46. Washington's citizenry believe otherwise, or there would be no

---

[20] The County and the Intervenors cite *Marchioro v. Chaney*, 90 Wn.2d 298, 305, 582 P.2d 487 (1978), *aff'd*, 442 U.S. 191, 99 S. Ct. 2243, 60 L. Ed.2d 816 (1979), in support of this assertion, but they do so in error. Br. King County, at 49. Br. Intervenors, at 49. *Marchioro* does not declare that equal application of a sex discriminatory law renders it constitutional, but rather holds that laws that serve to accomplish actual equality (*i.e.*, affirmative action laws) do not violate the ERA. *See* Section IV B(3)(c), *infra*.

ERA. Certainly, each plaintiff in this case experiences the sex discrimination of DOMA as an invidious individual and personal deprivation of a civil right. *See Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S. Ct. 836, 846, 92 L. Ed. 1161, 1185 (1948) (equality rights are "guaranteed to the individual**.** The rights established are personal rights."). The State cannot ameliorate this deprivation by imposing it equally, as the U.S. Supreme Court found in *Kraemer* when it rejected an "equal application" argument in support of restrictive covenants. It was "no answer" to the black petitioners that whites might also be denied rights of ownership and occupancy. *Id.*

Carried to its conclusion, the State's "equal application" argument would permit anti-miscegenation statutes so long as they did not promote White Supremacy. But *Loving* tells us that race is <u>always</u> an impermissible ground for denying marriage. As the plaintiffs in this case demonstrate, so is sex. What the State calls "equal application" does not save DOMA from the constitutional mandate that the right to marry may not be "denied or abridged on account of sex." Const. art. XXXI.

But the *Loving* analogy goes deeper. Behind the logic, here, as in *Loving*, lies a history of group-based discrimination. DOMA is embedded

in sexism every bit as much as miscegenation laws were embedded in racism. Keeping marriage as an exclusively heterosexual institution is based on gender-role stereotypes and exclusion of those who do not conform to them, just as anti-miscegenation laws were based on racial stereotypes.

As the *Loving* court recognized, anti-miscegenation laws sought to preserve the perceived distinctiveness between the races because those distinctions were thought to justify discrimination. 388 U.S. at 11 (characterizing the laws designed to maintain White Supremacy). Likewise, here, the State exaggerates the differences between the sexes to justify discrimination in the marriage laws. Much like commentators of the 1800s, they argue that men and women are essentially different in many ways beyond reproductive function, describing them as "opposites in sex, appearance, body structure and outlook[.]" Br. Intervenors, at 39; *accord* Br. County, at 37. *See also* CP 288-481 (Carnell Decl. and attached House Committee Report at 48) (Rabbi Daniel Lapin testified on 2/4/97 that "marriage domesticates men and enhances the life of women [through] the polar chemistry of men and women[.]"); *and* CP 356 (Washington Family Council, at 22, discussing male pedophiles and

stepfathers as child molesters); CP 385-386 (Testimony of Suzanne Cook, at 51-52, similarly characterizing men as uncivilized and sexually rapacious).

Notions about what men and women are like, what Justice Ginsburg has called "supposed inherent differences," have for thirty years been rejected as justification for sex discrimination. *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 2276, 135 L. Ed.2d 735, 752 (1996). Indeed, gender stereotypes like those embraced by the State have historically justified the subordination of women and confined them to roles as wives and mothers. As the State's chosen authority on marriage[21] wrote, "[t]he husband's right of dominion is therefore fully recognized . . . God has given the man greater wit, better strength, better courage, to compel the woman to obey by reason or force . . . his authority is acknowledged . . . and if the wife's wishes and interests clash with his own, she must yield." James Schouler, A Treatise on the Law of Husband and Wife § 55 (1882). The State embraces traditional marriage, but ignores that much of this tradition — with its approval of marital rape, for

[21] See Br. State, at 18, 19, 39.

example — rightly has been repudiated as has the tradition of racism renounced in *Loving*.

In fact, while the State asserts that the most central tradition of marriage is that it binds a male and female, the most central tradition of marriage is that it binds a man and his wife, mandating hierarchical roles to the sexes based on gender. *See* Nancy Cott, Public Vows: A History of Marriage and the Nation (Harvard Univ. Press, 2000) at 3. For most of the "millennia" invoked by the State, marriage was quintessentially premised on the doctrine of the wife's subjugation to the will of the husband. A mere 130 years ago, one prominent commentator described how "[t]he Scripture injunction to wives to obey their husbands, has found a place also in the law, which recognizes in husbands the right to command, and in wives the duty of obedience." Bishop, COMMENTARIES ON THE LAW OF MARRIED WOMEN UNDER THE STATUTES OF THE SEVERAL STATES AND AT COMMON LAW AND IN EQUITY, Vol. 1 at 26 (1873). Faced with suffragist rebellion against this tradition, no less an authority than a Supreme Court Justice declared it the "paramount destiny and mission of woman . . . to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 83 U.S. 130, 141, 21 L. Ed. 442, 446 (1873) (Bradley, J.,

concurring). The marriage laws, which enforced this destiny, were thought to be justified by "Nature."

> Should times change, and the same law of nature draw the women into the field of battle and into the harvest fields, and array the men in the kitchens and nurseries with the dishcloths . . . the law of the land ought also to change, and undoubtedly it would.

Bishop, at 28 (emphasis added). Today, women go to war and men change diapers. The tradition of defining an individual's destiny by the fact of being born male or female has been abandoned. Nature has not changed, but we have changed in our view of nature, rejecting that "biology is destiny." Accordingly, our laws have changed.

The ERA both recognizes and requires change. It forbids the State from enforcing distinctions between the sexes, barring the most narrow of exceptions, as discussed below. The State may not escape this mandate by applying sex-role stereotyping symmetrically, any more than the State of Virginia could by symmetrical application of its anti-miscegenation laws. A discriminatory law, though equally applied, remains a discriminatory law. There is no "equal application" exception to our ERA. DOMA discriminates on the basis of sex, and does so impermissibly, because it

fails the only two narrow exceptions to our Constitution's sex equality mandate.

b) DOMA Fails the Narrow Physical Difference Exception

The ERA does not permit laws that classify by sex where the law's purpose depends on actual and unique physical differences present in every member of the sex. *Guard,* 132 Wn.2d at 664. In the thirty-two years since passage of the ERA, this exception has been invoked once — to uphold a city ordinance prohibiting women, but not men, from baring their breasts in public. *City of Seattle v. Buchanan*, 90 Wn.2d 584, 591, 584 P.2d 918 (1978). In *Buchanan*, the court said that female breasts differed from male breasts because they are associated with sexual arousal, by virtue of their procreative function. To uphold "public decency and order," the city could require both sexes to cover those body parts deemed erogenous. 90 Wn.2d at 592. Nor could the defendants in *Buchanan* assert an interest in baring their breasts that approached "public decency and order" in importance. *Id.* Thus, the court declared the ERA not violated when an actual physical difference bears a reasonable relationship to the purpose of the law and the law does not curtail any important right or interest. *Id.* at 591 (ordinance "require[s] only inconsequential sacrifices from the individual").

By articulating this rigorous test, the *Buchanan* court carved out the narrowest of exceptions, one that demands an exceptionless and unique physical difference and demands a crucial nexus between that difference and the law's purpose and demands that no interest of consequence be sacrificed by application of the law. It is a test perforce stricter than federal strict scrutiny. *See U.S. v. Virginia*, 518 U.S. 515 (actual inherent differences may justify sex classification, but only under strict scrutiny). So, for example, group-based averaging of physical differences does not justify denying any particular girl the right to play high school football. *Darrin,* 85 Wn.2d 859. *Contra O'Connor v. Board of Education of School Dist. No. 23*, 645 F.2d 578 (7th Cir. 1981) (approving sex-segregated sports teams under equal protection clause). Thus, under the ERA, even if most boys are bigger and stronger than most girls, the test is not satisfied if some girls can make the football team; the physical difference must be exceptionless.

However, as the *Buchanan* court observed, not even physical difference that is unique and exceptionless, such as complementary reproductive function, will justify different treatment unless the difference reasonably relates to the purpose of the legislation. Therefore, the fact that

only women could become pregnant did not justify the state (pre-ERA) denying pregnant workers unemployment benefits. *Buchanan*, 92 Wn.2d at 592 (*citing Hanson v. Hutt*, 83 Wn.2d at 201 (superseded by ERA)).

Earlier (under the lower strict scrutiny standard), this Court declared that the reproductive difference between fathers and mothers did not mean mothers were less obligated to support their children financially. *Smith v. Smith*, 13 Wn. App. 381, 534 P.2d 1033 (1975). Most recently, this Court rejected treating fathers and mothers differently for purposes of the wrongful death statute, agreeing with the court of appeals that "[t]he capacity to suffer loss when a child dies is not unique to mothers." *Guard*, 132 Wn.2d at 667. Thus, in cases before *Buchanan* and in every case since *Buchanan*, the Washington courts have rejected the idea that the reproductive difference justifies different treatment.

Applying these principles to this case reveals that DOMA does not meet the "actual physical differences" exception. First, while male and female bodies in general perform different reproductive functions, not all men and women eligible to marry can reproduce. Any actual physical difference between the sexes is present only in some men and some women or present only for some part of their lives. That is, DOMA

permits people to marry who, because of dysfunction or age, cannot reproduce through sexual intercourse (as well as those who choose not to reproduce). Contrary to the State's assertion, DOMA does not limit marriage to couples who can "reproduce without third-party assistance." Br. State, at 21-22.[22] In terms of the *Buchanan* test, the physical difference between the sexes, though actual in the general sense, is not present in every member of the sex. *See Darrin*, 85 Wn.2d 859 (rejecting group averaging).

Nor does the reproductive difference, even if it were exceptionless, reasonably relate to the purpose of DOMA. DOMA lacks the crucial nexus between the physical difference and the law's purposes (purported and real). The State claims the restriction of marriage to different-sex couples serves the purpose of promoting reproduction. There are at least two problems with this claim: (1) the purpose of marriage is not solely or mainly procreation; and (2) restricting marriage to different-sex couples does not promote procreation. Excluding same-sex couples from marriage

---

[22] Both men and women beyond a certain age cease reproductive function, and by some estimates fully one-sixth of those in their childbearing years cannot reproduce through sexual intercourse, if at all. National Committee for Adoption, Adoption Factbook: United States Data, Regulations and Resources 157 (1989), cited in Note, *Rethinking Revocation: Adoption from a New Perspective*, HOFSTRA L. REV. (Spring 1995).

does not further the ostensible purpose of promoting unassisted reproduction by different-sex couples, as the State concedes by offering no evidence or argument to the contrary. While the baring of one woman's breast might be said to violate public decorum, the marriage of same-sex couples will have no effect on child-bearing by different-sex couples. Moreover, the state's own multi-faceted, multi-tasking marriage regulatory scheme (comprised of at least 423 separate state laws) attests to the multiple purposes served by marriage in stabilizing intimate relationships.

If DOMA had survived the *Buchanan* test to this point, it would still founder on the final prong: the balancing of interests. In *Buchanan*, the challengers to the ordinance could not assert a single serious interest at stake in the regulation: no right of expression, religion, privacy, petition, political action, or association, nor any marital, familial, educational, occupational, property, economic or social interest. Rather, their interest in going topless seemed recreational only. The city's countervailing interest in public decorum (to which the actual physical difference reasonably related) satisfied the court as to the ordinance's constitutionality.

Here, by contrast, in challenging DOMA the plaintiffs bring interests of constitutional proportions: their right to marry their life partners, to live free of sex and sexual orientation discrimination, to order their private lives as their hearts and identities and religious faiths dictate. Indeed, DOMA strikes at more than half of the rights and interests identified as important in *Buchanan*.

Arrayed against those interests, DOMA fails the physical difference test. It does not regulate specifically and narrowly on reproductive difference, but on sex. It does not promote procreation through sexual intercourse, as the state has not pointed to a single fertile, different-sex couple who will marry and have children because same-sex couples are excluded from marriage. It also denies substantial rights and impairs important, constitutionally-protected interests of the individuals here who seek to marry their loved ones.

c) DOMA Not Only Fails the Actual Equality Exception, It Promotes Inequality

There is one other exception, also narrow, to Washington's ERA: affirmative action programs designed to alleviate effects of past discrimination and attain equality in fact. *Guard,* 132 Wn.2d at 664 (citing *Electrical Contractors*, 100 Wn.2d at 127); *see also Gary Merlino*

Constr. Co. v. City of Seattle, 108 Wn.2d 597, 606, 741 P.2d 34 (1987); *Marchioro v. Chaney*, 90 Wn.2d 298, 305-06 (1978), *aff'd*, 442 U.S. 191, 99 S. Ct. 2243, 60 L. Ed.2d 816 (1979). The state makes no effort to justify DOMA as an effort to achieve actual equality for women. To the extent that DOMA reinforces marriage as sex role-defined, rather than a union of equals, equality is advanced by invalidating DOMA.

4. DOMA Embodies Unconstitutional Sex Discrimination

The lower courts did not decide whether DOMA violates the ERA because the judges felt bound by *Singer v. Hara,* 11 Wn. App. 247, 522 P.2d 1187 (1974). CP 895; *Castle* CP ("CCP" hereafter) 97-98. However, *Singer* is inapposite, not least of all because the passage of time has undermined all its premises, as surveyed above and below. *Singer* also is inapposite because it was wrong when it was decided. As the first to analyze Washington's ERA, the *Singer* court did not have the advantage of this Court's analysis in *Darrin, Marchioro,* and *Buchanan.* Nor did the court have for guidance 30 years of the most muscular ERA jurisprudence in the country.

Likewise, the *Singer* court did not have available the insights we have gained into the connection between sex and sexual orientation

discrimination. We now recognize that limiting life opportunities for men or women by mandating adherence to traditional gender role stereotypes is sex discrimination. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed.2d 268 (1990). Similarly, the sex stereotyping at play in DOMA limits both sexes by allowing marriage only to those men and women who fulfill "traditional" notions of acceptable gender role identification by choosing a life partner of the opposite sex. While this is most clearly seen as sexual orientation discrimination, the restriction — based solely on gender, and grounded in views of traditional normative gender roles — must also be recognized as sex discrimination.[23]

Finally, in the court below the State argued that those who passed the ERA did not mean to change the law in the way argued here. This speculation avails the State nothing; this Court must address the plain and simple mandate of the constitutional text. That the full implications of the ERA's language were not known then, and cannot be known now, does not alter the language. We know from federal constitutional jurisprudence

---

[23] For further explanation of the connections between sexual orientation and sex discrimination, *see, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L. REV. 197 (1994); Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992).

on the equal protection clause that divining the meaning of the clause for race and sex classifications has been a living process. *Compare Plessy*, 163 U.S. 537 (1896) *with Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Indeed, supporters of the Fourteenth Amendment assured critics that the equal protection clause would not require states to treat women equally, even if someday women were deemed to be "persons" under the clause. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1064 (Sen. Hale), 2767 (Sen. Howard) (1866). Just over one hundred years later, the U.S. Supreme Court applied the clause precisely to that use, in *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 225 (1971), and thus began the dismantling of the "gender apartheid" that had been the country's tradition since its inception.

As Justice Hamilton recognized when he concurred in *Darrin v. Gould* with "some qualms," the ERA announced the dawning of a very new day:

> Whether the people in enacting the ERA fully contemplated and appreciated the result here reached, coupled with its prospective variations, may be questionable. Nevertheless, in sweeping language they embedded the principle of the ERA in our constitution, and it is beyond the authority of

> this court to modify the people's will. So be it.

85 Wn.2d. at 878 (Hamilton, J., concurring). We have come to accept the wisdom of those who enacted the Fourteenth Amendment, even while recognizing that they themselves could not predict its ultimate meanings. We must likewise trust in the wisdom of the ERA.

C. Exclusion Of Gay And Lesbian Couples From Civil Marriage Violates The Equality Guarantee Of The Privileges And Immunities Clause Of The Washington Constitution

The couples here challenged their exclusion from the civil marriage laws under Const. art. I, § 12 of the Washington Constitution, which forbids the State from "granting to any citizen [or] class of citizens . . . privileges or immunities which upon the same terms shall not equally belong to all citizens." Both Judge Downing and Judge Hicks concluded that the marriage exclusion violated the fundamental equality guarantee of the privileges and immunities clause. CP 897; CCP 101-118. In *Castle*, Judge Hicks found sexual orientation to be a suspect classification subject to heightened scrutiny. CCP 118. To spare this Court repetition, plaintiffs defer to the ACLU's demonstration that Judge Hicks was correct. As Judge Downing also correctly held, even when measured under the most

lenient standard, the denial of marriage to same-sex couples violates Washington's guarantee of equality. CP 897.

1. Washington's Guarantee of Equality Should Be Interpreted Independent of the Federal Guarantee

With equality as with liberty, plaintiffs look to the Washington Constitution for relief, again because "[s]tate constitutions were originally intended to be the primary devices to protect individual rights." *State v. Smith*, 117 Wn.2d at 283 (Utter, J., concurring). Washington independently interprets its Constitution as appropriate "to confer greater civil liberties than its federal counterpart[.]" 117 Wn.2d at 286 (Utter, J., concurring) *(quoting Alderwood Assocs. v. Washington Envt'l Coun.,* 96 Wn.2d 230, 238, 635 P.2d 108 (1981)); *see also Gunwall,* 106 Wn.2d 54 (Const. art. I, § 7 of state constitution provides greater privacy protections against search and seizure than federal Fourth Amendment); *and First Covenant Church v. Seattle,* 120 Wn.2d 203, 224-25, 840 P.2d 174 (1992) (Const. art. I, § 11 provides stronger protection for freedom of religion than the First Amendment).

This Court's willingness to go beyond federal precedent in privileges and immunities cases is consistent with its independent evaluation of state constitutional provisions in these other areas. *See, e.g.,*

Hanson, 83 Wn.2d 195 (pre-ERA sex classifications receive strict scrutiny); *In re Mota,* 114 Wn.2d 465, 473-74, 788 P.2d 538 (1990) (intermediate scrutiny for classifications involving wealth or indigency); *accord State v. Phelan*, 100 Wn.2d 508, 513-14, 671 P.2d 1212 (1983); *see also O'Day v. King County*, 109 Wn.2d 796, 151, 749 P.2d 142 (1988) (Washington's "determination of whether a class is inherently suspect . . . may differ from [U.S.] Supreme Court conclusions.").

In the past two years, this Court has expressly affirmed that Washington's privileges and immunities clause has an independent meaning and provides greater protection than the federal equal protection clause. *Grant County Fire Protection District v. City of Moses Lake,* 145 Wn.2d 702, 725, 731, 42 P.3d 394 (2002) (*Grant County I); Grant County Fire Protection District v. City of Moses Lake,* 150 Wn. 2d. 791, 805, 83 P.3d 419 (2004) (*Grant County II*).

Contrary to the State's argument, this independent interpretation is not limited to cases where a minority is disfavored compared to the majority. The text itself, Washington precedent and common sense undercut that assertion. This was plain seventy years ago when this Court declared our privileges and immunities clause to guarantee equal treatment

to all state citizens "without undue favor on the one hand or hostile discrimination on the other." *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936) (emphasis added), *overruled on other grounds*; *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 955, 603 P.2d 819 (1979); *compare Hanson*, 83 Wn.2d 195 (under Washington Constitution, pregnancy classification is sex-based) *with Geduldig v. Aiello*, 417 U.S. 484, 94 S. Ct. 2485, 41 L. Ed.2d 256 (1974) (pregnancy classification not sex-based). Thus, when the State urges this Court to wait upon the federal court's analysis of the Fourteenth Amendment, it puts the cart before the horse. When the U.S. Supreme Court finds that the Fourteenth Amendment guarantees marriage equality to same-sex couples, that will be simply "a secondary layer of protection" for Washingtonians. *State v. Smith*, 117 Wn.2d at 283 (Utter, J., concurring).

2. Washington's "Relevant Difference" Test Is Deferential To The Legislature, But Not Meaningless

Where, as here, a privilege is granted to one class of citizens but denied another, this Court must determine under Washington's Constitution whether the classification rests "on some real difference

between those within and without the class that is relevant to the apparent or asserted [and legitimate] purpose of the legislation." *Grant County I*, 145 Wn.2d at 741 (Madsen, J., concurring in part and dissenting in part).[24] Judge Downing held that DOMA failed this test and he was right, as was Judge Hicks when he reached the same conclusion. CP 890-897. Denying marriage to same-sex couples does not advance even one legitimate state interest. It does not encourage different-sex couples to marry or to have children or to remain married for the sake of any children they may have. Finally, if it advances a particular morality, that interest alone has never been a sufficient rationale for discriminating among groups of persons. CP 890-891. *Accord Lawrence*, 539 U.S. at 577-578; 582 (O'Connor, J. concurring). Accordingly, there remains to the State nothing to argue but that there is no test, that the rational relationship test means absolute deference to the Legislature and, effectively, no judicial review.

---

[24]Justice Madsen's formulation of Washington's minimal scrutiny test under the privileges and immunities clause derives from a long history of Washington constitutional jurisprudence and comports with the independent interpretation this Court gave Const. art. I, § 12 in *Grant County II*. Accordingly, it is used here. However, DOMA fails under any formulation of the test. *See, e.g., State v. Coria*, 120 Wash.2d 156, 839 P.2d 890 (1992).

However, as Judge Downing recognized, deference does not mean that courts may abdicate their constitutional duty. CP 883-884. Rather, the court must examine in earnest whether "the distinctions giving rise to the classification [are] germane to the purposes contemplated by the particular law . . . ." *State ex rel. Bacich v. Huse*, 187 Wash. at 81. Similarly, under the federal test, "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause." *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 1627, 134 L. Ed.2d 855, 866 (1996). This "link" guards against classifications "drawn for the purpose of disadvantaging the group burdened by the law." *Id.* It ensures that the law does "not rest upon a mere fortuitous characteristic or quality of persons, or upon personal designation." *Bacich*, 187 Wash. at 81. Finally, the relevant purpose inquiry guards against the Legislature acting with improper motive, or allowing "outdated social stereotypes [to] result in invidious laws or practices." *Hanson*, 83 Wn.2d at 199 (quoting *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 18-20, 485 P.2d 529 (1971)).

Thus, this standard is deferential, but not meaningless, and under it not all purposes are created equal. Although the Legislature may have

broad discretion for some purposes (*e.g.*, taxation), in other regulatory areas classifications between groups are not valid unless they "rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act." *Grant County I*, 145 Wn.2d at 732 (quoting *State ex rel. Bacich v. Huse*, 187 Wash. at 80). In particular, regulations affecting personal civil liberties do not enjoy the same deference as do economic statutes. *Yakima County Deputy Sheriff's Ass'n v. Bd. of Commissioners*, 92 Wn.2d 831, 839, 601 P.2d 936 (1979) (Utter, J., concurring); *see also Lawrence*, 539 U.S. at 579-580 (O'Connor, J., concurring) (distinguishing personal relationship cases from economic or tax legislation).

This Court must therefore examine DOMA and answer whether and what differences between committed same-sex and different-sex couples bear "a natural, reasonable, and just relation" to the legitimate purposes the state effectuates through marriage and justify excluding gay people as a group from the law's protections. *Grant County I*, 145 Wn.2d at 732. As Judge Downing recognized, DOMA fails to satisfy this test.

3. Tradition and Past Practice May Not Substitute for Legitimate Governmental Interests

Judge Downing observed that the Legislature declared the purpose of DOMA to be Washington's "historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution." Laws of 1998, ch. 1, § 1. Judge Downing found these purposes "unavailing" and too vague, respectively. CP 893.

In particular, what the Legislature called a "commitment" to a particular configuration of marriage is better described as "convention" or "tradition." However, "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Goodridge*, 440 Mass. at 332 n. 23, 798 N.E.2d at 941 n. 23. Past practice did not stop the U.S. Supreme Court from finding an equal protection violation in anti-miscegenation laws. *Loving*, 388 U.S. 1. Without repeating the analysis of "tradition" above (*see* § IV A (4), *supra*), "[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L.J. 457, 469 (1897).

As for "protecting" marriage, again Judge Downing hit the nail on the head when he observed that any threats to marriage come from within,

such as "a shortage of commitment and an excess of selfishness." CP 892. Neither of these threats arise from the marriage of same-sex couples.

4. Even If Procreation Is A Purpose of Marriage, No Rational Relationship Exists Between Encouraging Procreation and Excluding Same-Sex Couples from Marriage

The State makes no real defense of the statute based on "tradition" and "protection" grounds, but relies completely on procreation, claiming that excluding same-sex couples furthers and protects procreation. *See, e.g.*, Br. County, at 33. Yet it is clear from Washington law that encouraging procreation is neither the purpose of DOMA nor the essential purpose of marriage, "since the sterile and the elderly are allowed to marry." *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting). Marriage eligibility is not determined by an ability or intention to have children. Indeed, people who have never had sexual relations in their marriage, and never plan to, may be married and may stay married. *See, e.g.*, *Turner*, 482 U.S. 78. "While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage." *Goodridge*, 440 Mass. at 332, 798 N.E.2d at 961.

The State's reproduction argument ignores that "[t]he link between civil marriage and procreation is not what it was when the laws prohibited both adultery and ready access to contraception." CP 893. Washington law does not encourage procreative sex, does not restrict sex to marriage, does not favor families who create children through intercourse over those who adopt or use assistive reproductive technology, does not restrict parenting to marriage and does not restrict marriage to parents. The State's procreation argument "singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." *Goodridge*, 440 Mass. at 333, 798 N.E.2d at 962.

Even if marriage encourages procreation, denying marriage to same-sex couples does not, and this is the Achilles' heel of the State's argument. Certainly, procreation is good for the species and for society and, thanks to the state, marriage is a good place to procreate. However, here "[t]he precise question is whether barring committed same-sex couples from the benefits of the civil marriage laws somehow serves the interest of encouraging procreation." CP 893-894. Understandably, the State provides no answer to this question. This is not a problem of loose

fit, the kind that might survive a rational relationship review. There is no fit between encouraging different-sex couples to marry and to have children within marriage and excluding same-sex couples from marriage, including those who have or intend to have children.

5. Denying Marriage To Same-Sex Couples Actually Disserves The State's Interests In The Welfare of Children

Taking the argument a step further, the Intervenors in particular claim that DOMA encourages the raising of children in healthy and nurturing environments. Br. Intervenors, § II A 2-3. How so? Surely, there is no better reason for state regulation than ensuring the welfare of its children. But that purpose cuts against depriving some families with children of the benefits marriage offers. Fortunately, we have repudiated an ancient tradition of treating as inferiors the children of unmarried parents. Our law makes no distinction between children whether their parents marry, whether their parents are genetically related, whether their parents conceive them through sexual intercourse, or conceive them at all.[25] Our law declares all children to be equally deserving of the State's

[25] In fact, Washington affirmatively facilitates adoption, RCW § 26.33, permits the use of assisted reproductive technology, RCW § 26.26.101(e); RCW § 26.26.210-260; RCW § 26.26.700 *et seq*., enforces parenting obligations similarly among the married and

solicitude, with one exception, and that exception is at issue here. Offering to plaintiffs' children the benefits enjoyed by their peers, to be raised with the greater security and stability marriage affords to families, advances the State's interest without in any way — not in any single respect — diminishing the value of marriage to children of different-sex couples. *See* CP 884-885.

With inexorable logic, Judge Downing reached the same conclusion as the high courts in Massachusetts and Vermont. *Goodridge*, 440 Mass. at 335, 798 N.E.2d at 964 ("Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'"); *Baker v. Vermont*, 170 Vt. at 219, 744 A.2d at 882 ("If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues

---

unmarried, RCW § 26.26.101, and does not discourage contraception. *O'Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991) (interest in autonomy is fundamental and therefore accorded utmost constitutional protection; this right "involves issues related to marriage, procreation, family relationships, child rearing and education.").

the marriage laws are designed to secure against."). Certainly, it is not rational for the State to declare on one hand an equal interest in the well-being of all children, then on the other hand to treat some of these same children as "outliers." *Goodridge*, 440 Mass. at 335, 798 N.E.2d at 963 ("the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws.").

6. The State Does Not And May Not Play Favorites Among Childrearing Families

The Intervenors and County advance an additional justification for treating these children as second-class citizens. Br. Intervenors, at 39-40; Br. County, at 35-37. They argue that marriage must be reserved to different-sex couples to encourage the rearing of children in "traditional homes" comprised of a male and female parent. This wish to reward or to penalize couples based on whether they conform to stereotypical gender roles is a constitutionally improper attempt to turn back the clock. As Justice O'Connor trenchantly has observed, "[t]he demographic changes of the past century make it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 63, 120 S. Ct. 2054, 2059, 147 L. Ed.2d 49, 55 (2000). Moreover, such value-laden arguments echo eerily arguments marshaled against interracial marriage. *Perez*, 32 Cal.2d

711, 721-28, 198 P.2d 17, 22-27 (1948). In any case, the state has no business defining, and rightly makes no attempt to define, what traditions a family honors or breaks. If it did so, it would bear a heavy burden to justify that intrusion. *See, e.g., Griswold,* 381 U.S. 479 (married couple's use of contraception); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S. Ct. 571-573, 69 L.Ed. 1070, 1078 (1925) (right to educate children in private school); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625-626, 67 L.Ed. 1042, 1045 (1923) (right to teach children a foreign language). In particular, the State does not enforce on parents, even different-sex parents, compliance with a particular role based on their genders.

Instead of "traditional," the County and Intervenors inveigh against "bad" homes, arguing that different-sex couples raising their own biological children create the most favorable environment for children to grow and thrive. Br. County, at 35-38; Br. Intervenors, at 35-45. This "best environment" theory seeks to enforce "social norms" and encourage "good behavior" and "normative behavior." Br. Intervenors, at 36-37. This case makes no challenge to these personal views; rather, it demonstrates that Washington law does not permit the state to accomplish

these purposes by regulating marriage. Our state judges parents, when it judges them at all, on their individual merits. *See, e.g., In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983) (parent's homosexual orientation did not support *per se* denial of visitation); *In re Marriage of Wicklund*, 84 Wn. App.763, 770, 932 P.2d 652 (1996) (same).[26] The State does not disparage single parents, adoptive parents, unmarried parents, or infertile parents. Nor does the state deny lesbians and gay men the right to parent, as illustrated by some of these plaintiffs, "who, thanks to government recognition of the fact that their sexual orientation is no bar to good parenting, are presently able to enjoy family lives with children." CP 784. Indeed, the State and County do not dispute

[26] Washington's Parenting Act recognizes that the "best interests" of the child are not served by elevating one type of idealized "traditional" family structure above all others, but by serving the real needs of children as they actually are, in their current families, whether they live with foster or adoptive parents, married or not, unmarried biological parents, divorced or separated parents, step-parents or single parents. CP 599-601. Washington family law does not determine appropriate parenting arrangements by resort to *per se* rules that emphasize any single quality as imperative or determinative, but rather applies a flexible approach to serve the individual needs of the children. CP 602. Washington's Parenting Act specifically takes no account of parents' sex or sexual orientation, but rather views parents according to their relationships with their children and their demonstrated ability to perform parenting functions. *Id.*

that same-sex couples may be excellent parents. *See, e.g.,* Br. County, at 36 n.15. All the relevant science agrees.[27]

Though this case obviously involves no challenge to the parenting rights and abilities of lesbians and gay men, the Intervenors' true dispute appears to be with the state's divorce, parenting, reproductive, and adoption laws and policies. Relying on personal, often religiously-founded opinion[28] and on research on the effects of divorce on children, they argue that lesbians and gay men are inferior parents.

---

[27] Scientific research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish. CP 624-625. It is beyond reasonable scientific dispute that children of gay men and lesbians fare as well on all measures of well-being, development, and adjustment as children of heterosexuals. Because of the studies referred to by expert James McKeever, PhD., the American Medical Association has resolved to support legislative and other efforts to permit same-sex couples to adopt. AMA Res. H-60.940, Partner Co-Adoption, available at http://www.ama-ason.org/apps/pf_new/pf_online?f_n= browse&doc=policyfiles/HnE/H-60.940.HTM (last viewed 11/22/04). The American Academy of Pediatrics, after extensive research into nontraditional families, adopted a policy supporting adoption by same-sex and non-married couples. American Academy of Pediatrics, News Release: AAP Says Children of Same-Sex Couples Deserve Two Legally Recognized Parents, available at http://www.aap.org/advocacy/archives/febsamesex.htm (last viewed 11/22/04). The American Psychological Association also supports reform to promote legal ties between same-sex couples and their children by ending discrimination in the adoption and civil marriage laws. APA Resolution on Sexual Orientation and Marriage, available at http://www.apa.org/pi/lgbc/policy/marriage.pdf (last viewed 11/22/04).

[28] The Intervenors submitted three declarations below. Of these, the declarations submitted by local minister Douglas Wheeler and by Allan Carlson of The Howard Center for Family, Religion & Society in Rockford, Ill., are devoid of any showing that the declarants are testifying to anything other than their personal religious beliefs when they contend that children do better in a household headed by a different-sex couple.

Besides being false, that is not this fight. Some children have lesbian and gay parents. The question is: are they to be refused the enhanced security and stability that marriage offers? Because the Intervenors insist that marriage is a great benefit to children, they must concede that its denial is a significant harm. Indeed, it is a harm similar to that traditionally visited upon children born to parents who were unmarried, *see Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed.2d 436 (1968) *and Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed.2d 768 (1972), or were undocumented immigrants, *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed.2d 786 (1982). Rejecting the arguments of the Intervenors and the County, Judge Downing reached the inevitable conclusion that withholding marriage from gay and lesbian couples actually impairs "the goal of nurturing and providing for the emotional wellbeing of children." CP 895.

In fact, the Intervenors' real complaint seems to be with Washington's no-fault divorce laws. Intervenors offer the declaration of Connecticut psychiatrist Dr. Jeffrey Satinover, best known for his book Cracking the Bible Code (Harper Collins 1997). Relying entirely on studies showing that children from stable two-parent families do better on

average than children from single-parent homes, Dr. Satinover tries to make apples into oranges to conclude that marriage between committed same-sex couples somehow would be harmful to children. This conclusion simply does not compute, as Dr. Klawitter of the University of Washington pointed out in her supplemental declaration. CP 620-622. Not even George Dent, in *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 595 (1999), relied on extensively by Intervenors, was willing to stretch the data as Dr. Satinover did, conceding that "[s]tudies of children raised by gay parents are inconclusive."

Of course, the plaintiffs want to marry, not divorce. They agree with Dr. Satinover that children fare better with two parents, and that marriage is a plus for families. However, this case is not about whether divorce is good or bad for children, whether marriage is good or bad for children, whether gay people are good or bad parents, whether children need a mother and father, or whether genetic ties to their children make adults better parents. As illustrated above, the State already has determined not to regulate in those areas: that is, not to impede divorce, or to require couples to marry before bearing children, or to require that only

couples raise children, or that only couples of different sexes do so. The State's regulation (and lack thereof) in this area speaks for itself.

7. Civil Marriage Serves Many Purposes Unrelated to Childbearing and Childrearing

Moreover, despite the State's attempt to limit the alleged public purpose of marriage to reproduction and childrearing so it can elevate the importance of the reproductive sex roles, the fact is that civil marriage is not defined by or limited to bearing and raising children. The state regulates marriage in innumerable ways and legislates extensive benefits and burdens for married couples that have nothing to do with children. Viewed economically, "marriage is a publicly-provided mechanism that allows couples to organize their joint lives with maximum efficiency." CP 53. The efficiencies, security, and stability of civil marriage help the married partners care for one another and for other legal and non-legal dependents, including grandchildren and nieces and nephews, aged parents and other elderly relatives, and critically-ill family members. For example, for lower-income couples facing the need for long-term care, marriage may provide a crucial bulwark against living out their final years in poverty, ameliorated by the state Medicaid program, which provides

significant protections for married participants and their spouses, but no equivalent provisions for unmarried couples. *See* CP 610-615.

Denying same-sex couples the financial protections, stability and predictability of legal marriage undermines their ability to care for each other and their dependents as effectively and responsibly as married couples. This deprivation not only harms these families, it harms the state. In some cases, the state may be required to step into the vacuum created when family members are denied the legal tools to provide care, insurance benefits or financial support.

The State ignores these myriad marriage regulations in favor of a singular focus on anatomy. However, this analysis impermissibly "identifies persons by a single trait and then denies them protection across the board." *See Romer,* 517 U.S. at 633. This Court therefore must consider whether and to what extent animus underlies DOMA.

8. Passage of DOMA Was Clearly Motivated By Anti-Gay Animus

The County has stressed that the Court need not ascertain what actually motivated the legislators to enact DOMA, but may posit any legitimate public purposes that would be served by this exclusion. Br. County, at 34 n.13. As demonstrated above, neither the County, nor the

State, nor the Intervenors identify even one. And all three ignore the overt prejudice that, at least in part, motivated DOMA's passage.

Yet the legislative record contains explicit expressions of bias and bigotry from both legislators and witnesses, including particular religious views condemning homosexuality. Representative Mike Sherstad justified his support for DOMA by saying "[h]omosexuality in its action is so repugnant to people, myself included. . . . We don't understand how people could engage in it. So why do we want to legitimize it?"[29] Representative Ed Murray, an openly gay legislator, reported that "[t]he prime sponsor . . . has said that lesbians and gay should be sent off to be reprogrammed as heterosexuals . . . as recently as two nights ago, [he] suggested that I be reprogrammed." CP 288-481. One witness at the committee hearing equated homosexuality with incest and murder and claimed that "[m]ost male homosexuals are compulsively promiscuous. Those who remain married bring disease into the family." CP 288-481.

---

[29] Lynda V. Mapes, *House Passes Ban on Gay Marriages — Backers Say Bill Defends 'God's Choice,'* SEATTLE TIMES, Feb. 5, 1998, available at http://archives.seattletimes.nwsource.com/cgi-bin/texis-cgi/web/vortex/display?slug=2732683&date=19980205&query=Sherstad (last viewed 11/22/04).

It is beyond dispute that prejudice or animus against a particular group cannot be a legitimate purpose of state law. "A discriminatory classification that is based on prejudice or bias is not rational as a matter of law." *Miguel v. Guess*, 112 Wn. App. 536, 553, 51 P.3d 89 (2002). "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 2826, 37 L. Ed.2d 782, 788 (1973) (emphasis in original); *accord Romer*, 517 U.S. at 634; *see also Lawrence,* 539 U.S. at 582 (O'Connor, J., concurring) ("Moral disapproval of this group . . . is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.")

Courts regularly apply "a more searching form of rational basis review" when there is reason to believe that animus or a "desire to harm" a particular group caused the legislature to adopt a statute. *Lawrence,* 539 U.S. at 580 (O'Connor, J., concurring) (discussing *Romer v. Evans*); *see also City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S. Ct. 3249, 3529, 87 L. Ed.2d 313, 325 (1985) (zoning

regulation prohibiting home for the mentally retarded found to be born of animus towards that group); *Moreno*, 413 U.S. at 534 (legislative history showed that restricting food stamps to households composed exclusively of related individuals was motivated by animus towards "hippies" rather than desire to prevent fraud, as suggested by the government).

The legislative record here reveals how prejudice influenced the passage of DOMA in violation of the fundamental constitutional principle that the legislature must "remain open on impartial terms to all who seek its assistance." *Romer*, 517 U.S. at 633. This record provides another reason for the Court to look carefully at the justifications offered to support the marriage restriction to ensure they are not premised on impermissible bias.

9. DOMA Does Not Survive Even The Rational Relationship Test

Even without the searching review suggested by the prejudice of some involved in the passage of DOMA, the exclusion of same-sex couples from marriage does not survive the rational relationship test. Judicial review that is anything more than the pointless exercise urged by the State leaves nothing left of DOMA's rationale. No legitimate purpose — not encouraging procreation nor benefitting children — relates in any

rational way to the deprivation at issue here. And although limiting marriage to different-sex couples would repeat historical practice, repetition is not itself a legitimate purpose. Accordingly, Judge Downing concluded that excluding same-sex partners from civil marriage was not rationally related to any legitimate state interest. CP 876. The respondents respectfully ask this Court to affirm his ruling.

D. Half Measures Will Not Do; Same-Sex Couples Are Entitled To Marry

Our territorial court recognized that marriage "is so unique that if all contracts possible were to be classified scientifically into varieties, species, genera, classes, etc., it would stand alone in the most comprehensive subdivision to which it should be assigned." *Maynard v. Valentine,* 2 Wash.Terr. at 16. For similar reasons, the Supreme Judicial Court of Massachusetts made clear earlier this year that an unconstitutional marriage exclusion cannot be remedied by offering the excluded group a separate, inferior status. *Opinions of the Justices to the Senate,* 440 Mass. 1201, 802 N.E.2d 565 (2004). The State urges this Court to reject that principled approach, and instead turn away the couples here without judicial redress, leaving it to the Legislature to create a separate legal status, akin to Vermont's "civil union" system. Br. State, at

8, 49-50. *See* Vt. Stat. Ann. tit. XV § 1201.[30] The recent history of Vermont's Family Code, segregated as it is by sexual orientation, and America's history of segregation by race, illustrate too well why this remedy is not constitutionally adequate.

Second-class status perpetuates discrimination. In *Lawrence*, the Supreme Court overturned the Texas sodomy law, even though it was hardly ever used, because it was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. While true that bigoted attacks on persons perceived to be lesbian or gay will not stop automatically when marriage equality is achieved, it is also true that offering civil unions instead of marriage will reinforce the stigma of second-class status and encourage the pervasive harms of anti-gay prejudice.

In 1896, the U.S. Supreme Court upheld a Louisiana law requiring railroads to provide "separate but equal" accommodations for the "white

---

[30] The Vermont legislature created "civil unions" after the Vermont Supreme Court found that barring lesbian and gay couples from civil marriage is unconstitutional as a matter of Vermont law. *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (1999). Civil unions are available only to same-sex couples. The Vermont Supreme Court has not passed on whether the separate civil union law cures the constitutional violation, as the plaintiffs dismissed their case after the statute's passage.

and colored races," rejecting the plaintiff's argument that such separation "stamps the colored race with a badge of inferiority." *Plessy,* 163 U.S. at 551. Whether it applies to railroad cars, to schools, or to civil unions, "[t]he history of our nation has demonstrated that separate is seldom, if ever, equal." *Opinions of the Justices*, 440 Mass. At 1206, 802 N.E.2d at 569. The profound error of segregation's caste system has been one of our nation's touchstone lessons. Our ability to learn that lesson has been a source of strength, pride and identity as a people. Now, it is readily understood that America "neither knows nor tolerates classes among citizens." *Romer*, 517 U.S. at 623 (*quoting Plessy,* 163 U.S. at 559). The country learned this lesson over a century of struggle; Washington must not recreate that error here. Even if the state could provide equivalent benefits, the "dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual couples to second-class status." *Opinions of the Justices*, 440 Mass. at 1207, 802 N.E.2d at 570.

Further, the State urges this Court to view marriage instead as merely a bundle of rights and obligations, rather than as a status that is

more than the sum of its "parts." Br. State, at 38. "However, marriage is not just a bundle of rights. Legal marriage in the United States is, and has been for hundreds of years, a privileged status. . . . Being married reflects not only personal choice, but also one's status in the community and in society." CP 76. It is a unique status defined and protected by numerous rights, benefits and obligations. Still, it is a status, possessing "an attribute of legitimacy that has been earned through many years of validation and institutionalization by governments and society." *Id.* Civil unions provide no equivalent.

Moreover, the "civil union" solution is deceptive in another way, disguising a real threat to marriage. As Judge Downing sagely observed:

> If there is indeed any outside threat to the institution of marriage, it could well lie in legislative tinkering with the creation of alternative species of quasi-marriage. With the creation of "civil unions," "domestic partnerships" or other variations on the theme including, worst of all, something like a "five year plan with opt-out," there could be a real danger. When cohabiting heterosexual couples can sign up for a renewable or revocable fixed term contract to define the terms of their state-recognized relationship, then marriage, as an institution, could be weakened. Better, perhaps, (in terms of simplicity, fairness and social policy) to allow all who are up to taking on

> the heavy responsibilities of marriage, with its exclusivity and its "till death do us part" commitment, to do so — not lightly, but advisedly.

CP 876. If marriage is to mean anything in today's world, it must be entrusted to those who, like the respondents before this Court, inspire the realization of the marriage ideal.

V. CONCLUSION

For all these reasons, Heather Andersen and Leslie Christian, along with the fourteen other plaintiffs, ask this Court to declare RCW § 26.04.010(1) and RCW § 26.040.020(1)(c) unconstitutional under the Due Process and Privileges and Immunities Clauses of the Washington Constitution and under Washington's Equal Rights Amendment, and to order King County to issue them marriage licenses.

DATED this 24th day of March, 2005.

Respectfully submitted,

NORTHWEST WOMEN'S LAW CENTER

By: _____
Patricia Novotny, WSBA # 13604
Nancy Sapiro, WSBA #18751
Lisa M. Stone, WSBA #15421

HELSELL FETTERMAN, LLP

By: _____
Bradley H. Bagshaw, WSBA #11729
Jennifer S. Divine, WSBA #22770

LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.

By: _____
Jennifer C. Pizer, Pro Hac Vice

PRESTON GATES & ELLIS LLP

By: _____
Jamie D. Pedersen, WSBA #24690