

NO. 75934-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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HEATHER ANDERSEN and LESLIE CHRISTIAN, et al.,

Respondents,

v.

KING COUNTY, et al.,

Appellants,

v.

STATE OF WASHINGTON,  
Appellant,

And

SENATOR VAL STEVENS, et al.,

Appellants (Intervenors).

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INTERVENOR'S REPLY BRIEF

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## INTRODUCTION

Plaintiffs' argument rests on three false premises. The first is that the object of civil marriage "is to satisfy [society's] need for the orderly regulation of property ... of two individuals [who] declare themselves legally 'next of kin' to one another ..." Andersen Brief of Respondents, p. 25 (hereinafter "Resp.-A. Brief"). This statement may describe one way in which government regulates marriage, but it does not tell us why society has a "need" to recognize the union of two people who declare themselves "next of kin."

The State has little interest in regulating any two people who wish to be committed to one another. Plaintiffs' construct of civil marriage is so broad as to be incoherent, nor can it answer the question why society recognizes marriage in the first place.

The second false premise buttressing Plaintiffs' position is that the State has ceased to prefer the marriage of a man and woman as the best environment for procreation and raising children. Resp. A-Brief, pp. 31-33. The State places children in single-parent homes or permits adoption by couples in which at least one member is a non-biological parent when it serves that particular child's best interests. That does not mean that the State wants to elevate such homes to the same status as those headed by a child's own mother and father for public policy purposes.

Society needs a plan for raising the children that result from heterosexual sex. Civil marriage is that plan. At no time has the Legislature ever stated that it has abandoned that model, perhaps because the way nearly all children enter the world is not likely to change any time soon.

Plaintiffs' third false premise is that Article 1, §12 of the Washington Constitution requires the State to show how excluding homosexuals furthers procreation and childbearing in heterosexual homes. In other words, "reasonable grounds" review and the "rational basis" test demand that all legislation achieve a perfect fit, *i.e.*, an underinclusive statute is invalid. This premise turns the standard of review on its head. The State need no more "prove" that excluding gays furthers the purposes of heterosexual marriage than excluding bisexuals who wish to marry a man and woman furthers the goals of heterosexual marriage.

Heterosexual marriage is not about discriminating against gays, lesbians and bisexuals. Nor is it about relegating Plaintiffs' relationships to second-class status. Gay and lesbian relationships may equal heterosexual relationships in desire for commitment, but they are not equal in their contribution to society. This is so, not because policy makers harbor anti-gay animus, but because they correctly conclude that the profoundly important gender differences in the areas of procreation and

childbearing are unique. Washington's limitation of marriage to opposite-sex unions (hereinafter "marriage limitation") exists for sound public policy reasons that do not happen to warrant extending marriage to same-sex couples.

### ARGUMENT

**I. THE LIBERTY INTERESTS PROTECTED BY WASHINGTON'S DUE PROCESS CLAUSE ARE NOT IMPLICATED BY LIMITING CIVIL MARRIAGE TO HETEROSEXUAL UNIONS.**

**A. The Principal Cases Striking Down Barriers To Marriage Are Inapposite Because The Heterosexual Plaintiff-Couples Were Within The Marriage Limitation.**

Washington State's marriage laws do not prevent Plaintiffs from making "the most intimate and personal choices ... central to personal dignity and autonomy" that "are central to the liberty protected by the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). Plaintiffs have made intimate and personal choices and come to this Court as couples with active and full lives together. Resp.-A Brief, p. 2. But that is not enough. Instead, Plaintiffs must show that the constitutional jurisprudence that has removed various barriers to civil marriage invalidates the "one man one woman"

limitation.<sup>1</sup> In each of those cases the plaintiff-heterosexual couple sought to remove a barrier to civil marriage for which it was otherwise qualified. The barrier was removed because the heterosexual couple had the potential to fulfill the principal purpose of marriage: to encourage procreation in marriage.

Referring to the procreative purpose of marriage, the *Loving v. Virginia* court stated: "Marriage is one of the 'basic civil rights of man,' fundamental to our *very existence and survival*." *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 18 L. Ed. 2d 1655 (1942)) (emphasis added). The restriction struck down in *Loving*, was anti-procreative as the restriction's "purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood ...'" *Loving*, 388 U.S. at 7. Thus, *Loving* and those cases involving other marital restrictions are inapposite to this controversy. Unlike the plaintiff heterosexual couples in those cases, Plaintiffs here challenge the

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<sup>1</sup>*Zablocki v. Redhail*, 434 U.S. 374, 386, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) ("Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection."); *Turner v. Safley*, 482 U.S. 78, 95-96, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) ("most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated"); *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 18 L. Ed. 2d 1655 (1942): "Marriage and procreation are fundamental to the very existence and survival of the race.")

importance of society's interest in bringing order to heterosexual sex through marriage.

**B. Plaintiffs Reduce Marriage To A Private Arrangement In Order To Remake The Fundamental Right.**

Plaintiffs side-step the undeniable public benefits of marriage by positing a private theory of civil marriage, without supporting authority: "Society uses civil marriage to satisfy its need for the orderly regulation of property ... of two individuals [who] declare themselves legally 'next of kin' to one another ..." Resp.-A Brief, p. 25. It is faulty constitutional analysis to permit a party to redefine the right at stake before determining its application.

**1. *Plaintiffs' definition is incoherent.***

Plaintiffs' definition of civil marriage must be wrong for at least three reasons. First, it is incoherent. What interest does the State have in recognizing any two people who want to declare themselves "next of kin?" Any two committed people who wish to live together, raise children, care for parents or combine to share in some other long-term task would qualify. The State has no particular interest in granting their union recognition. It is no answer that gay relationships include the component of sexual intimacy while other "next of kin" relationships do not. The State has no interest in regulating the former because they have non-

procreative sex. Plaintiffs' private theory of civil marriage would strip it of the public benefit that justifies recognizing and protecting marriage in the first place. Plaintiffs' contrived theory of marriage reduces it to a favorable financial arrangement for the benefit of the couple. However,

it [civil marriage] is not so much the result of private agreement as of public ordination. It serves pre-eminently as the basis of civil institutions in every enlightened government, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.

*Maynard v. Hill*, 125 U.S. 190, 213, 8 S. Ct. 723, 31 L. Ed. 654 (1888).

2. *Courts defining marriage recognize its significant benefits to society.*

Second, no court has defined civil marriage in such private terms other than *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 961 (Mass. 2003). By contrast, courts addressing the fundamental right at issue focus on the public benefits of civil marriage. Brief of Intervenors, p. 37.

3. *The marriage limitation has been reaffirmed, repeatedly, by the same voters who show ever greater tolerance for diverse family forms and gay and lesbian behavior.*

Plaintiffs' theory of civil marriage does not reflect the modern experience of most Americans as indicated by the large majority of voters

who have rejected Plaintiffs' theory at the polls. The public nature of civil marriage advanced by the State is not merely rooted in history, or found only in old dictionaries, as Plaintiffs would like this Court to believe. It is in fact quite contemporary. In every election in which voters have been given the opportunity to express their understanding of civil marriage, they have affirmed by supermajorities the nexus between state recognition of heterosexual marriage and the great social good it provides. Within the last ten years, forty-one states have codified in statute or amended their constitutions to preserve the marriage limitation.<sup>2</sup>

The size of these majorities strongly suggests that while voting to protect the marriage limitation, many of these voters accept the State's retrenchment from the regulation of sex, birth control, gay and lesbian behavior and assisted reproductive technology. At the same time, it also supports the notion that civil marriage remains the vital institution it has always been for bringing order to heterosexual intercourse. Simply because the State may place a child in the home of a non-biological or single-parent home to serve that particular child's best interests does not mean the State or the public regards a home headed by a child's own

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<sup>2</sup>Alliance Defense Fund, *DOMA Watch*,  
<<http://www.domawatch.org/stateissues/index.html>>.

mother and father as the same.<sup>3</sup> The State needs a plan, however unattainable it may be for some, for raising the children that result from heterosexual sex.

Marriage is forward-looking. It is society's preference for where children *will be* born. Adoption and court-directed custody, by contrast, are backward-looking. They are examples of society's methods for solving a problem created by broken families. The State's interest in maximizing the number of children to be born and raised in a marriage should not be confused with its interest in protecting children when families have fractured.

The broad support for the marriage limitation by a tolerant public also undercuts Plaintiffs' argument that liberty interests have evolved to the point of recognizing a right to same-sex marriage under *Lawrence*. It

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<sup>3</sup> Although the State no longer requires sexual intimacy and procreation in marriage through threat of criminal sanction, Plaintiffs mischaracterize the impact on the make-up of the average American family household. According to the 2000 U.S. Census, "the vast majority of family households in 2000 - households containing at least one person related to the householder by birth, marriage, or adoption- were married-couple households (54.5 million). The next largest type of family household were those maintained by women or 12.9 million. U.S. Census Bureau, Special Reports, Households, and Families: 2000, (issued Sept. 2000), <<http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>>.

Marriage is far from just one among many of the living arrangements tried by Americans. Among the 221.1 million people aged 15 or over in 2000, 120.2 million were married and 41 million had been married. Accordingly, 72.9 percent of Americans were or had been married at one time. That number would clearly be higher if 15-17 year olds, few of whom marry, were removed from the analysis. U.S. Census Bureau, Special Reports, Marital Status: 2000, (issued Oct. 2000), <<http://www.census.gov/prod/2003pubs/c2kbr-30.pdf>>

was important to the court in *Lawrence* that by the time it decided the case, only thirteen states retained anti-sodomy laws and all of them had a pattern of non-enforcement in the case of consenting adults. *Lawrence*, 539 U.S. at 559. Similarly, only sixteen states had anti-miscegenation laws by the time the court decided. *Loving*, 388 U.S. at 6, n. 5.

By contrast, the American public has reaffirmed the marriage limitation as recently as the November elections. The voters of our sister state, Oregon, and ten other states reaffirmed by large majorities that heterosexual marriage is the societal model for procreation and raising children.<sup>4</sup> Moreover, the court refused to extend its holding to create same-sex marriage. *Lawrence*, 539 U.S. at 579. *See also id.* at 585 (O'Connor, J. concurring). Whether under the rational of *Lawrence* or *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), neither current experience nor tradition, support a theory of civil marriage that reduces it to a private choice of any two persons who wish to "declare themselves next of kin" so that gays and lesbians may marry.

Hence, the fundamental right in question is civil marriage that serves the vital public interest of organizing heterosexual sex. This is the

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<sup>4</sup> NCSL News, *Voters Decide High Profile Issues on State Ballots* (November 3, 2004), <<http://www.ncsl.org/programs/press/2004/pr041103.htm>>.

civil marriage that justifies state recognition and the panoply of obligations and benefits that go with it. Clearly, then, Plaintiffs do not have a liberty interest or fundamental right in same-sex “marriage.” And as discussed below, their due process and privileges and immunities claims must fail because the State has a legitimate purpose for limiting marriage to heterosexual unions.

**II. THE MARRIAGE LIMITATION PROMOTES EQUALITY BETWEEN THE SEXES AND DOES NOT VIOLATE THE EQUAL RIGHTS AMENDMENT.**

Plaintiffs contend that Washington’s Equal Rights Amendment (“ERA”), Const. Art. XXXI, § 1 requires the State to redefine marriage to include same-sex relationships. Plaintiffs’ arguments severely strain the ERA’s meaning and purpose. Plaintiffs confuse “sex” with “sexual conduct.” They also erroneously contend that the marriage limitation exists to subjugate women, confining them to traditional gender stereotypes. Washington’s marriage laws apply equally to both sexes. The opposite-sex limitation does not violate the ERA.

**A. Washington’s Marriage Laws Do Not Target Gender As A Basis For Discrimination Because They Treat Men And Women Alike.**

The ERA was enacted to prohibit gender classifications that disadvantage one sex over the other. *Marchioro v. Chaney*, 90 Wn.2d 298, 306-07, 582 P.2d 487 (1978), *aff’d* 442 U.S. 191, 99 S. Ct. 2243, 60

L. Ed. 2d 816 (1979). This Court has held that the ERA “is designed to protect the substantial rights of women” and not to strike down laws that are based upon reasonably related differences in gender. *City of Seattle v. Buchanan*, 90 Wn.2d 584, 592, 584 P.2d 918 (1978).

The ERA’s purpose is to take a biological, immutable fact—a human’s gender—and preclude use of that person’s gender as a justification for differential treatment. See *Singer v. Hara*, 11 Wn. App. 247, 259, 522 P.2d 1187 (1974), *review denied*, 84 Wn.2d 1008 (1974). For example, a girl cannot be prohibited from joining a high school football team because she is a girl. *Darrin v. Gould*, 85 Wn.2d 859, 540 P.2d 882 (1975). See also *Guard v. Jackson*, 132 Wn.2d 660, 661, 940 P.2d 642 (1997) (father cannot be barred from joining wrongful death suit).

Division I of the Court of Appeals dealt squarely with this issue in *Singer*, 11 Wn. App. at 258. The court held:

To accept the appellants’ contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment.

*Id.*

Washington courts as well as other jurisdictions have continued to follow *Singer* and reject sexual discrimination claims similar to Plaintiffs. See, e.g., *Marchioro*, 90 Wn.2d at 305-06; *Guard*, 132 Wn.2d 660. See also *In re Kandu*, 315 B.R. 123, 142, Bankr. L. Rep. P 80, 145 (W.D. Wash. 2004); *Dean v. District of Columbia*, 653 A.2d 307, 363 n. 2 (D.C. 1995) (Steadman, J., concurring); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864, 880 n. 13 (Vt. 1999); *Phillips v. Wisconsin Personnel Commission*, 167 Wis.2d 205, 482 N.W.2d 121, 128 (Wis. 1992). *But see Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993).

Not even the Vermont Supreme Court in *Baker v. Vermont*, which resulted in the creation of civil unions and upon which Plaintiffs' rely, found a sex discrimination claim:

The Vermont court held that "marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex . . . each sex is equally prohibited from precisely the same conduct.

*Baker*, 744 A.2d at 880, n.13.

Plaintiffs repeatedly remind this Court of Washington's intolerance for sex discrimination. No one disputes this. However, the ERA does not apply unless one sex is disadvantaged over the other. Here, both men and

women have an equal opportunity to marry. While Plaintiffs may wish to assert a due process or privileges and immunities right based on sexual preference, the ERA deals with sex, not sexual conduct. Because the statutes do not target a particular gender for special treatment, the ERA does not apply.

**B. Plaintiffs' Analogy To *Loving v. Virginia* Is Erroneous As The Marriage Limitation Does Not Exist To Discriminate Against Men Or Women, Or For That Matter, Homosexuals.**

Plaintiffs allege that the Intervenors' "equal application" argument fails under *Loving v. Virginia*, 388 U.S. 1. They claim that the anti-miscegenation statutes in *Loving* are essentially the same as Washington's limitation of marriage to opposite-sex unions. Plaintiffs' comparison falls short. *See also* Brief of Intervenors, pp. 20, 24.

The *Loving* court specifically found that the anti-miscegenation laws were "obviously an endorsement of the doctrine of White Supremacy." *Loving*, 388 U.S. at 7. The statutes were a "comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages." *Id.* at 4. The *Loving* court also noted that its decision reflected the overwhelming view of the Nation and that the limitation was not imposed uniformly against all non-white races. *Id.* at 4, 11.

In contrast, Washington's marriage laws are not a "comprehensive statutory scheme" of invidious discrimination against women.<sup>5</sup> Unlike Virginia's recent anti-miscegenation laws, Washington (as well as nearly all of Western civilization) has always limited marriage to opposite-sex unions. Peter Lubin and Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-sex Marriage*, 47 Cath. U. L. Rev. 1271, 1324 (1998). There is simply no historical evidence that the marriage limitation was designed to discriminate against either gender.

Despite this, Plaintiffs assert for the first time on appeal that Washington's marriage limitation oppresses women. Plaintiffs argue:

DOMA is embedded in sexism every bit as much as miscegenation laws were embedded in racism. ... [W]hile 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

Resp.-A Brief, pp. 41, 44.

Plaintiffs spend pages pontificating on how heterosexual marriage is a male-dominated institution. Are Plaintiffs seeking to invalidate marriage as discriminatory against women or to obtain marriage

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<sup>5</sup> Plaintiffs claim that DOMA was motivated by anti-gay animus. This assertion, although incorrect, should be considered under their Privileges and Immunities and Due Process claims, not the Equal Rights Amendment. For purposes of the ERA, Plaintiffs must prove that Washington's marriage limitation discriminates against them because of their sex, not sexual conduct or preference.

recognition and its benefits for themselves? They cannot seem to decide. And if marriage is discriminatory toward women, the only remedy that will eliminate this deplorable wrong is to end marriage altogether. Expanding it to include homosexuals will not stop women from being oppressed in marriage.

Moreover, Plaintiffs' arguments completely miss the mark. The opposite-sex requirement does not distinguish between what men and women are permitted to do in or out of marriage nor between the governmental benefits they may obtain. In direct contrast to Plaintiffs' claims, the opposite-sex limitation itself conveys a clear message of equality, not discrimination. It tells us that women make a vital contribution to marriage and that both genders are equally necessary to that relationship. Expanding marriage to include gay men would send the opposite message—that women are not necessary to marriage—and would, ironically, create a form of marriage that is thoroughly male-dominated. Marriage does not exist to discriminate against women or men. Plaintiffs' reliance on *Loving* is misplaced.

**C. Washington's Marriage Limitation Reflects The Actual Physical Differences Between The Sexes And Opposite-And Same-Sex Relationships.**

The ERA is not designed to strike down laws that are based upon actual gender differences. *Buchanan*, 90 Wn.2d at 592. A law that (1)

reflects differences in the sexes and (2) has “a reasonable relationship to the legitimate legislative purpose which it serves” does not violate the ERA. *Id.*

Plaintiffs suggest that the marriage limitation fails the “actual differences” exception unless 100 percent of all humans, regardless of dysfunction or age, can reproduce. Resp.-A Brief, pp. 48-49. Plaintiffs incorrectly frame the issue and mischaracterize the law.

*City of Seattle v. Buchanan* involved an ordinance that prohibited women, but not men, from bearing their breasts in public. The women claimed this restriction violated the ERA. The court noted that not all women have breasts that appear physically different from men. *Buchanan*, 90 Wn.2d at 587, 591. Despite this, the court upheld the ordinance’s gender distinction. *Id.* at 588-89. It explained:

When the legislative intent is viewed in light of the obvious purpose of the ordinance to protect the public morals and its concern for the privacy of intimate functions common knowledge tells us, as it undoubtedly told the trial judge, that there is a real difference between the sexes with respect to breasts, which is reasonably related to the preservation of public decorum and morals. Governmental bodies have a right to enact laws to maintain a decent society.

As Plaintiffs here suggest that society’s view of homosexuality is changing, *see e.g.*, Resp.-A Brief, pp. 51-53, the *Buchanan* plaintiffs

argued that “concepts of morality and propriety” were changing and that the women’s conduct was increasingly less offensive to the public. *Id.* at 589-90. The Court responded:

If it is true, then it can reasonably be expected that public demand will soon make it imperative that this portion of the ordinance be repealed. Suffice it to say that the argument attacks the wisdom and necessity of the ordinance, matters which the courts lack the constitutional authority to decide....

There being such a difference between the breasts of males and females (however indiscernible to the naked eye of some), and that differences having a reasonable relationship to the legitimate legislative purpose which it serves, the ordinance does not deny equality of rights or impose unequal responsibilities on women. *It applies alike to men and women requiring both to cover those parts of their bodies which are intimately associated with the procreation function.* We find that the ordinance in question does not violate Const. art. 31.

*Id.* (emphasis added).

A classification that takes into account inherent sexual differences, *i.e.* the sexual nature of women's breasts verses men's, does not run afoul of the ERA where it bears a rational relationship to the purpose of the ordinance - protecting the public order and morals. Similarly, opposite-sex marriage takes into account inherent sexual differences associated with the procreative function, *i.e.* the procreative-complementariness of a man and woman, but as in *Buchanan*, applies the distinction to men and

women equally (two men cannot marry, neither can two women). Contrary to Plaintiffs' assertion, the alleged gender distinction is not based on whether an individual can reproduce, but on (1) the fact that all men and women have the physical attributes related to the procreative function and (2) as a matter of biology, same-sex couples can never produce their own offspring.

The procreative distinction is rationally related to the purpose of encouraging marriage between the only two people who can combine to make and raise their own child. It encourages child-rearing by both natural parents, furthers a child's interest in being raised by a mom and a dad, and promotes a family structure that has been a successful foundational unit for our society. *See* Brief of Intervenors, pp. 35-48.

Plaintiffs wish to live in a world with no gender differences. They assert that the purpose of the marriage restriction is "grounded in views of traditional normative gender roles" – roles that subordinate women. *Resp.-A Brief*, p. 53. Experience and common sense tell us that the marriage institution accommodates a wide range of gender roles. Plaintiffs themselves concede that today "woman go to war and men change diapers." *Resp.-A Brief*, p. 45. That does not mean the sexes are fungible for all purposes.

As the United States Supreme Court has explained:

Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. *See Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Physical differences between men and women, however, are enduring: “[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.”

*United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)).

Also, Plaintiffs’ derogatory statements concerning marriage assume, but fail to establish, the accuracy of Plaintiffs’ position as well as the very complex issue of social causation. Such an assumption is improper at trial, let alone on summary judgment. Plaintiffs’ grievances and subjective worldview do not provide a justification for this Court to repeal policy choices appropriately made through the democratic process. There is no violation of the ERA because sex discrimination is not present in the marriage limitation.

### **III. THE MARRIAGE LIMITATION SERVES VITAL PUBLIC INTERESTS AND DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.**

#### **A. *Gunwall* Does Not Support An Independent Interpretation of Article I § 12.**

Plaintiffs seek to bootstrap the ERA's prohibition and the State's general commitment to individual rights into their privileges and immunities claim. They hope that this will persuade this Court to apply stricter scrutiny. Castle Brief of Respondents, pp. 16-19 (hereinafter referred to as "Resp.-C Brief"). Plaintiffs fail to identify clear differences between their claim and other cases where this Court has declined to engage in an independent interpretation of Article I, § 12.

For many years, this Court has looked to federal equal protection jurisprudence when interpreting the State's Privileges and Immunities Clause. See e.g., *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 140, 960 P.2d 919 (1998). This last year, the Court chose to depart from this approach, but only in limited circumstances. *Grant County Fire Prot. Dist. v. City of Moses Lake No. 5*, 150 Wn.2d 791, 806, 83 P.3d 419 (2004) ("*Grant County II*"). *Grant County II* explained that an independent constitutional analysis of Article I, § 12 is appropriate "when the issue concerns favoritism." *Grant County II*, 150 Wn.2d at 809.

That is not the case here. Neither *Grant County II* nor any other court decision holds that such an analysis should occur every time a party asserts the loss of an individual right. For these reasons and those raised by the State and County in their Reply briefs, an independent analysis is not appropriate. RAP 10.1(g)(2).

**B. Even If This Court Independently Interprets Article I, § 12, Plaintiffs' Claim Fails Because They Have No "Privilege" At Stake.**

Plaintiffs' Article I, § 12 claim still fails whether this Court follows federal equal protection jurisprudence or an independent analysis. "It does not follow ... that when an independent analysis is employed, unconstitutionality will be found ...." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 737, 42 P.3d 394 (2002); *rev'd*, *Grant County II*, 150 Wn.2d 791. If this Court independently interprets Article I, § 12, it must first find that "the law, or its application, must confer a privilege to a class of citizens." *Grant County II*, 150 Wn.2d at 812. This Court has explained that "it must be remembered that not every statute authorizing a particular class to do or obtain something involves a 'privilege' subject to Article I, § 12." *Id.*

[A]s this court made quite clear early in this State's history, the terms "privileges and immunities" pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship.... *By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.*

*Id.* at 813 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)) (emphasis added). Plaintiffs' claim fails if there is no fundamental right of state citizenship at issue. *Id.* at 814. See also *State v. Ross*, 152 Wn.2d 220, 240-41, 95 P.3d 1225 (2004).

Federal precedent clearly states that a fundamental right must be objectively and deeply rooted in this Nation's history and tradition. *Glucksberg*, 521 U.S. at 720-21; *Lawrence*, 539 U.S. at 593. *Grant County II* and previous privileges and immunities cases explain that federal precedent provides strong persuasive authority as to the definition of a fundamental right or privilege under Washington law. It is beyond dispute that same-sex "marriage" has never been rooted in this Nation or this State's history and, as such, cannot be a fundamental right.<sup>6</sup>

Perhaps in recognition of this, Plaintiffs ask this Court to depart from the "history and tradition" test. However, Plaintiffs provide no analytical framework for creating a new privilege except broad reliance on tolerance and gender equality in light of the "changing civilization." Resp.-C Brief, p. 25; Resp.-A Brief, pp. 51-53. Certainly, the law cannot be defined by history and tradition alone. Nor should fundamental rights be determined at the public's whim. Requiring such rights to be deeply rooted in our collective conscience and history has provided a discernable standard and served us well in the past. Courts should exercise great caution when creating new fundamental rights. Our history, legal

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<sup>6</sup>*Lofton v. Department of Children and Family Svcs.*, 358 F.3d 804, 817 (11<sup>th</sup> Cir. 2004), *cert. denied*, , --S. Ct. --, 73 U.S.L.W. 3247 (Jan. 10, 2005) ("We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.").

traditions and practices have consistently provided “the crucial guideposts for responsible decisionmaking.” *Glucksberg*, 521 U.S. at 721 (quoting *Collins v. City of Parker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)).

The “history and tradition” test does not require the imposition of a static and mindless set of legal principles. It ensures that fundamental rights are not based simply on the personal and arbitrary predilection of judges. It encourages the courts to carefully consider the implications of creating such a right before removing the matter from further public debate and legislative action. *Id.* It also requires a claimant to provide substantial justification for tossing out what society has collectively determined and has been proven to be beneficial.

Even in *Lawrence* and *Loving*, cases that the Plaintiffs heavily rely upon, the Court made certain that the overwhelming majority of the Nation shared the same understanding with regard to repeal of the laws at issue. *Lawrence*, 539 U.S. at 559; *Loving*, 388 U.S. at 6, n. 5. While the culture may increasingly accept private homosexual activity, it is by no means ready to redefine marriage to endorse that activity through state-sanctioned marriage. This remains a controversial question. Well over three-fourths of this Nation has recently reaffirmed the marriage limitation and adherence to the endorsement of heterosexual marriage as a rich,

meaningful and positive contribution to society.<sup>7</sup> Whether one analyzes Plaintiffs' claim under *Lawrence*, *Loving* or *Glucksberg*, based on current experience or historical precedence, the State has not deprived Plaintiffs of a fundamental right or privilege. Plaintiffs do have the right and privilege to marry. They do not have the right to marry persons of the same-sex.

**C. Homosexuals Are Not Members of a Suspect Class Because Sexual Preference Is Not Immutable and Homosexuals Are Not Politically Powerless.**

Plaintiffs concede that neither Washington State nor the federal courts have found homosexuals to be members of a suspect class. Such a classification has consistently been limited to "race, alienage, or national origin." *City of Celburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Washington follows federal law when recognizing a suspect class. *Seeley v. State*, 132 Wn.2d at 776, 791, 940 P.2d 604 (1997), *State v. Shawn P.*, 122 Wn.2d. 553, 559-60, 859 P.2d 1220 (1993). To qualify as a suspect class, Plaintiffs must demonstrate that they have suffered a history of discrimination, exhibit obvious, immutable or distinguishing characteristics that define them as distinct group, and show that they are a minority or politically powerless. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9<sup>th</sup> Cir. 1990), *rehearing denied by*,

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<sup>7</sup> NCSL News, *Voters Decide High Profile Issues on State Ballots* (November 3, 2004),

909 F.2d 375 (9<sup>th</sup> Cir. 1990). As the United States Supreme Court has warned: “[R]espect for the separation of powers’ should make courts reluctant to establish new suspect classes.” *Thomasson v. Perry*, 80 F. 3d 915, 928 (4<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 948 (1996) (*quoting Cleburne*, 473 U.S. at 441).

1. ***Homosexuals do not possess obvious and immutable traits.***<sup>8</sup>

Homosexuality is not obvious nor sufficiently defined as are race, gender, or alienage. There is nothing inherently consistent in the “homosexual” label that could assist the court in legally defining a class. The only common element is that, at some point, an individual has had a same-sex desire. “Homosexuality” is self-proclaimed, identified without any means of verification, and includes those who have had past or present heterosexual relationships. *See* Brief of Intervenors, pp. 31-32.<sup>9</sup> Should this Court mandate a new suspect class, the class would be the first

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<<http://www.ncsl.org/programs/press/2004/pr041103.htm>>.

<sup>8</sup> Intervenors do not dispute that some homosexuals have suffered some past discrimination.

<sup>9</sup> *See e.g.*, Laumann EO, Gagnon JH, Michael RT, Michaels S., *The Social Organization of Sexuality* (Chicago: The University of Chicago Press, 1994), p. 290 (2002); Throckmorton W. “Initial Empirical and Clinical Findings concerning the Change Process for Ex-gays,” *Professional Psychology: Research and Practice* 2002, 33(3): 242-248; Michaels, S. “The Prevalence of Homosexuality in the United States,” *Textbook of Homosexuality and Mental Health* (Washington DC: American Psychiatric Press, 1996), pp. 43-63; Brown LS, “Lesbian Identities: Concepts and Issues,” *Lesbian, Gay, and Bisexual Identities Over the Lifespan: Psychological Perspectives* (New York: Oxford University Press, 1995) 3-23.

instance in which a person could invoke the protections of the class on one day and deny membership on the next.

Furthermore, the assertion that homosexuality is immutable is not without doubt, and at the very least, overstated and unproven. It would be improper to base any part of the Court's ruling on immutability when this case comes before the Court after disposition on summary judgment. The Ninth Circuit has held that "homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage." *High Tech Gays*, 895 F.2d at 573-74. More importantly, the court has never determined that homosexuals are members of a suspect class. Plaintiffs concede this. Resp.-C Brief, p. 50.

Plaintiffs rest their claim that homosexuality is immutable as a matter of law on *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9<sup>th</sup> Cir. 2000). Plaintiffs mischaracterize the *Hernandez-Montiel* decision as a complete correction of the *High Tech Gays*. Resp.-C Brief, p. 54. *Hernandez-Montiel* did not posit any definition of homosexuality when making its pronouncement. Nor did the court analyze the significance such a definition would have on *High Tech Gays* and its other prior decisions to the contrary. It certainly did not hold, much less discuss, whether homosexuals qualify as a suspect class.

Plaintiffs' reliance on *Hernandez-Montiel* is also misplaced because the court limited its focus to determining whether the petitioner belonged in a "particular social group" for immigration purposes. *Hernandez-Montiel*, 225 F.3d at 1091. Finally, *Hernandez-Montiel* relied solely on the petitioner's uncontroverted testimony that he was gay and that he could not change his sexual orientation. The court specifically reasoned that membership in a particular group was a question of fact. *Id.* The court's ruling that the petitioner's homosexuality was immutable is therefore limited to a finding of fact in the face of uncontroverted testimony in that particular case. *Id.* By contrast, the issue of immutability in this case is disputed by the State, was not litigated at the trial court level, and there is no basis for making a sweeping public policy decision that would impact the general public.

**2. *Homosexuals are not politically powerless.***

Homosexuals also fail to meet the second requirement for suspect class status. They are not politically powerless. The Gay and Lesbian Victory Fund announced that at least 41 of the 65 openly gay candidates it endorsed were elected to national, state and local offices in 2004 including in five of the twelve states that passed state constitutional amendments

prohibiting same-sex “marriage.”<sup>10</sup> Moreover, lawmakers continue to strengthen local, state and federal laws to prohibit discrimination against homosexuals. Nor are same-sex households economically disadvantaged. *See* Brief of Intervenors, p. 31, n. 17-18.

Plaintiffs suggest that they have no political power because “sexual orientation” has not yet been added to the text of the Washington Law Against Discrimination. Resp.-C Brief, p. 55. However, “sexual orientation” has been added to a myriad of other state and local discrimination laws. *See* Brief of Intervenors, p. 31, n. 17-18. And while some legislation introduced on behalf of the homosexual community may not have been enacted, other legislation has and continues to be. *See e.g.*, RCW 10.95.120(6)(e)-(f). The failure to pass a piece of legislation does not demonstrate a lack of political clout.

3. ***High Tech Gays is not undermined by the Lawrence decision.***

The Ninth Circuit has unequivocally held that homosexuals are not a “suspect or quasi-suspect class.” *High Tech Gays*, 895 F.2d at 571. Plaintiffs argue that the *Lawrence* court “erased the foundation for

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<sup>10</sup> *See* The Gay and Lesbian Victory Fund, *Gay Candidates with Key Races Across U.S.*, (November 3, 2004), <<http://www.victoryfund.org/index.php?src=news&prid=35&category=News%20Releases>>; Binnie Fisher, “Gay Candidates Won In Unlikely Places,” *Washington Blade*, November 5, 2004, p. 24.

decisions such as *High Tech Gays*.” Resp.-C Brief, p. 51. They overreach.

First and foremost, *Lawrence* recognizes that homosexuals’ choices in the privacy of their own home are protected. It never suggests that homosexuals constitute a suspect class. *Lawrence*, 539 U.S. at 579; *See also Lofton*, 358 F.3d at 818. Second and contrary to Plaintiffs’ assertions, state and federal courts have correctly recognized that *Lawrence* does not undermine *High Tech Gays*. *High Tech Gays* is a correct ruling and remains good law.<sup>11</sup>

**4. Plaintiff Castle’s application of Oregon law ignores the substantial weight of contrary federal and state authority.**

Plaintiffs rely almost solely on *Tanner v. Oregon Health Sciences Univ.*, 157 Or. App. 502, 971 P. 2d 435, 445 (Or. App. 1998), to suggest that this Court should create a new suspect class.<sup>12</sup> In addition to the

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<sup>11</sup> *See e.g., In re Kandu*, 315 B.R. 123, 144, Bankr. L. Rep. P 80, 145; *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir.2003); *State v. Limon*, 32 Kan.App.2d 369, 83 P.3d 229, 241 (Kan. App. 2004) (Malone, J., concurring).

<sup>12</sup> Plaintiffs citation of *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993) and *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. 1998) are unhelpful in that both cases apply heightened scrutiny on the basis of sex discrimination, not sexual orientation, reasoning not followed by any other appellate court. Plaintiffs citation of *Children’s Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4<sup>th</sup> 740, 118 Cal. Rptr. 2d 629 (Cal. Ct. App. 2002), relied on dicta. Similarly, *Holmes v. California Nat’l Guard*, 90 Cal. App. 4<sup>th</sup> 297, 109 Cal. Rptr. 2d 154 (Cal. Ct. App. 2001) upheld the trial courts’ decision, but does not hold that homosexuals are a suspect class entitled to heightened scrutiny. *See also Holmes v. Cal. Nat’l Guard*, 124 F.3d 1126 (9<sup>th</sup> Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999)(homosexuals are not members of a suspect or quasi-suspect class).

Ninth Circuit, all other federal courts of appeal have unanimously found that sexual orientation is not a suspect class. *See* Brief of Intervenors, p. 28, n. 12. Because of the glaring lack of federal and Washington precedent, Plaintiffs attempt to bolster their argument by relying on a lone Oregon decision.

First, Plaintiffs encourage the Court to extend Washington's privileges and immunities protections beyond equivalent federal protections despite the court's past reluctance to do so. *See Seeley*, 132 Wn.2d at 791; *State v. Smith*, 117 Wn.2d 263, 276-77, 814 P.2d 652 (1991). Moreover, nothing in the *Tanner* decision implies that an independent analysis of Washington's constitution would reach the same result. To the contrary, *Tanner* did not examine whether a fundamental right exists nor did it apply the three part test Washington uses to determine suspect class status. *Seeley*, 132 Wn.2d at 791; *Shawn P.*, 122 Wn.2d at 559-60; *Smith*, 117 Wn.2d at 276-77.

Second, Plaintiffs claim that *Tanner* is more persuasive than any other authority because Oregon's privileges and immunities clause was the model for Washington's privileges and immunities clause. Plaintiffs fail to mention that none of the other five states with virtually identical clauses to Washington have held that homosexuals constitute a suspect class. Ariz. Const. Art. 2, § 13; Ark. Const. Art. 2, § 18; Ind. Const. Art. 1, § 23;

Iowa Const., Art. 1 §6; and S.D. Const. Art. 6 §18. *But see* Ore. Const. Art. 1 § 20. Indiana courts, whose privileges and immunities clause was the model for Oregon, have declined to find that homosexuals are a suspect class despite recent opportunity and have specifically refused to recognize a right to same-sex marriage under its privileges and immunities clause. *See Cornell v. Hamilton*, 791 N.E. 2d 214 (Ind. App. 2003); *Morrison v. Sadler*, 2003 WL 23119998 (Ind. Super. 2003) (unpublished opinion). Similarly, no other state with privilege and immunities clauses similar to Washington has found that homosexuals are a suspect class.<sup>13</sup> While Washington certainly should examine its own constitutional history to determine the meaning of Article I, § 12, it should be extremely cautious about creating a new suspect class when the overwhelming majority of courts have refused to do so.

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<sup>13</sup> *See Standhardt v. Superior Court ex rel. County of Maricopa*, 206 Ariz. 276, 77 P.3d 451 (Ariz. 2003) (applying rational basis test to statute prohibiting marriage license to persons of same gender); *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (Ark. 2002) (applying rational basis and reasoning that homosexuals are not a protected class); *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 474 (Iowa 1983) (holding that transsexuals are not a protected class by virtue of their sexual orientation).

**D. The Reasonableness Of The “One Man And One Woman” Limitation Is Undeniable And Demonstrates That The Legislature Drew The Classification For Reasons Other Than To Disadvantage Gays And Lesbians.**

**1. *This Court should apply the rational basis test to Plaintiffs’ claim.***

Plaintiffs have no fundamental right to same-sex “marriage” nor are persons with a same-sex desire members of a suspect class. If this Court looks to federal precedent to guide its interpretation of Article I, § 12, it should apply the highly deferential rational basis test to Plaintiffs’ claim. The State need only show that the distinctions giving rise to the classification are germane to the purposes contemplated by the law. The Court may “assume the existence of any necessary state of facts which it can reasonably conceive.” *Seeley*, 132 Wn.2d at 795; *State ex rel. Bacich v. Huse*, 187 Wash. 75, 81, 59 P.2d 1101 (1936). The link between the statute’s classification and purpose guards against classifications drawn for the purpose of disadvantaging a group burdened by the law. *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

**2. *If this Court independently interprets Plaintiffs’ claim and finds that Plaintiffs’ have a “privilege” at stake, it should apply the “reasonable grounds” test, which is similar to the “rational basis” test.***

Plaintiffs do not have a “privilege” at issue should this Court decide to independently interpret Article I, § 12. If Plaintiffs have no

a legislative classification will satisfy both tests if it rests on an actual difference that is reasonably related to the law's purpose. The marriage limitation passes both tests as it serves real and vital societal interests.

3. ***DOMA merely reaffirmed the State's public policy regarding marriage to qualify for the federal DOMA; it did not single out gays and lesbians for unequal treatment.***

Plaintiffs' claim that the Legislature enacted Washington's Defense of Marriage Act, Washington Laws of 1998, ch. 1 ("DOMA"), for the purpose of disadvantaging homosexuals ignores the early and recent history of the marriage limitation. As DOMA's legislative findings make clear, a super-majority of the State House and Senate enacted DOMA to obtain the protections of the federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). The federal DOMA allowed states to deny recognition of a same-sex "marriage" valid in another state. RCW 26.04.010, finding, c.1. Washington's DOMA merely reaffirmed the public policy regarding marriage recognized since territorial days and by Western civilization for hundreds of years.

Heterosexual marriage is not about discriminating against gays and lesbians. Gay and lesbian relationships may equal heterosexual relationships in passion and feelings of commitment, but they do not implicate the societal interests that are served by civil marriage. Marriage

law predates homosexuality as an identifiable group by hundreds of years. It exists for sound public policy reasons that do not happen to justify extending marriage to same sex couples. The marriage limitation is not drawn to burden gays and lesbians but channel heterosexual sex and the children that result therefrom into the stable home of the two biological parents who are responsible for bringing them into the world.

4. *Plaintiffs misstate the standard for reviewing the marriage limitation.*

Plaintiffs distort the “rational basis” and “reasonable grounds” tests to create a higher standard when they claim the State must show how excluding homosexuals furthers procreation and child-rearing in heterosexual homes. They argue in effect that a statute fails the reasonableness tests if it is underinclusive. But the State need not “prove” that excluding gays furthers the purposes of heterosexual marriage any more than it must prove that the exclusion of other family structures permitted by a free society furthers the purpose of civil marriage. “In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group.” *Romer*, 517 U.S. at 632.

5. *The State's unwillingness to intrude into the procreative intentions and capabilities of prospective couples is based on privacy concerns and not a sign that procreation is a pretext for invidious discrimination.*

Plaintiffs claim marriage eligibility has never been based on the procreative intent or capability of the couple, therefore the marriage limitation must be for discriminatory reasons. Rather, citing *Goodridge*, they say, the “exclusive and permanent commitment of the marriage partners to one another ... is the *sine qua non* of civil marriage.” Resp.-A Brief, p. 63 (citing *Goodridge*, 798 N.E.2d at 961).

However, Plaintiffs fail to respond to the obvious point raised in Intervenors’ opening brief that inquiring into the procreative intent or capacity of prospective couples would raise profound privacy concerns under the Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). Moreover, overinclusiveness is permissible. *Campbell v. State Dep’t of Social and Health Svcs.*, 150 Wn.2d 881, 901, 83 P.3d 999 (2004).

But if the State’s reluctance to make procreative intent an explicit eligibility requirement suggest inconsistency, Plaintiffs “eligibility requirements” are no less problematic. If “exclusivity” and “permanent commitment” are the *sine qua non* of marriage, Plaintiffs cannot show that intent and capability to maintain an exclusive and permanent relationship

have ever been requirements for marriage. Plaintiffs, therefore, prove nothing by the State's unwillingness to demand that heterosexual couples answer intrusive questions to determine their marriage eligibility.

6. *The purposes of encouraging procreation and child-rearing in marriage are not cast into doubt because homosexual couples who have chosen to adopt or use artificial reproductive technology cannot be married.*

Plaintiffs contend that if encouraging child-rearing in stable environments is the purpose of marriage, then there is no basis, other than animus toward gays, to withhold marriage from homosexual couples who chose to adopt or have children through artificial reproductive technology. Yet this demand for a perfect fit undermines the separation of powers. The courts may not substitute their judgment for the Legislature even if the law "seems unwise or works to the disadvantage of a particular group." *Romer*, 517 U.S. at 632.

Two groups may be similarly situated with respect to one objective of a law without the classification impermissibly excluding one of the groups from its benefits. A law which provided educational benefits to military service draftees, in part to help them readjust to civilian life, only granted such benefits to draftees who served on active duty and not to conscientious objectors who performed alternative civilian service. *Johnson v. Robison*, 415 U.S. 361, 94 S. Ct. 1160, 30 L. Ed. 2d 389

(1974). The additional objective of making military service for active duty draftees more attractive was rationally related to the classification. *Id.* at 383.

When, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory.

*Id.* Similarly, because the State has a legitimate interest in making marriage attractive to heterosexuals who can combine to have children, while homosexuals cannot, the marriage limitation is not discriminatory even though some gays may have children.

Additionally, the marriage limitation is as narrowly tailored as it can be given the State's interest in promoting heterosexual sex within marriage. If civil marriage were expanded to include homosexual couples, it would become overly-broad as then any two individuals who wish to be committed to each other would qualify.

7. *It is rational for the State to withhold the imprimatur of marriage until social science can confirm, if ever, that households headed by same-sex couples can achieve the same outcomes in childhood development and well-being.*

Before society reconfigures "the great public institution, giving character to our whole civil polity" and places its imprimatur on gay marriage, society had better be sure gay relationships offer the same

stability, gender modeling and diverse parenting styles that are undeniably true of heterosexual homes. And clearly, social science is unable to reach any such settled conclusion regarding the well-being of adolescents, much less adults, raised in a household headed by gay parents, given the recency of gay and lesbian couples living together openly, as their children's sole parents. *Goodridge*, 798 N.E.2d at 979-980 (Sosman, J., dissenting).<sup>14</sup>

Because they cannot rebut them, Plaintiffs mischaracterize the conclusions reached by several extensive peer reviewed studies summarized by Dr. Jeffrey Satinover. Brief of Intervenors, pp. 41-42. Along with other factors, the studies noted that fathers play an important, non-fungible role, in the development of children into healthy, well-adjusted adults. It is rational for the Legislature to conclude that the State's approbation that accompanies marriage should not be given to

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<sup>14</sup> "Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. .... the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes?" *Goodridge*, 798 N.E.2d at 979-980 (Sosman, J., dissenting).

unions that guarantee children will grow up in fatherless (and motherless) homes.<sup>15</sup>

Plaintiffs claim that scientific research has conclusively shown that children flourish equally in opposite-sex households as households where there is no gender diversity. But this claim is patently false. There are significant flaws with the studies referenced in the declaration of Plaintiffs' expert, James McKeever Ph.D. CP 624-625. (p. 70, n. 27).<sup>16</sup> Science cannot yet answer the question whether same-sex households achieve the same results as opposite-sex couples because there is simply insufficient data, *i.e.*, an insufficient number of children raised in same-sex homes who have reached adulthood. *Goodridge*, 798 N.E.2d at 998-999 (Cordy, J. dissenting).

One underreported study suggests they are not equivalent. It is the published study of Professor Sotirios Sarantakos in 1996 that traced the results of educational success and social development of 174 children in three types of households—58 children living with heterosexual married

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<sup>15</sup> See also *Lofton*, 358 F.3d at 818 (“[t]he state has a legitimate interest in encouraging this optimal family structure [opposite-sex unions] by seeking to place adoptive children in homes that have both a mother and father.”).

<sup>16</sup> Robert Lerner, Ph.D., and Althea K. Nagai, Ph.D., “No Basis: What the Studies Don’t Tell Us About Same-Sex Parenting,” *Marriage Law Project*, 2001. “Some major problems uncovered in the studies include ... Unclear hypotheses and research designs, missing or inadequate comparison groups, self-constructed, unreliable and invalid measurements, non-random samples, including participants who recruit other participants, samples too small to yield meaningful results, missing or inadequate statistical analysis.” *Id.* at 3.

couples, 58 children living with heterosexual cohabiting couples, and 58 children living with homosexual couples (47 lesbian and 11 gay male). Sotirios Sarantakos, "Children in Three Contexts: Family, Education and Social Development," *Children Australia*, Vol. 21, No. 3 (1996). Analysis of variance demonstrated that the families headed by married couples resulted in the best environment for children's social and educational development for almost every measure. Dr. Sarantakos concluded:

Overall, the study has shown that children of married couples are more likely to do well at school in academic and social terms, than children of cohabiting heterosexual and homosexual couples. . . . [F]amily environments are definitely instrumental for the development of the attributes which encourage educational progress and social development among children. However, these environments are shown to vary significantly according to the life style of the parents, leading to adverse reactions among . . . children.

*Id.* at 30.

Accordingly, it is reasonable for the Legislature to withhold the State's endorsement attached to marriage until the social science is better developed.

### **CONCLUSION**

Plaintiffs urge this Court to redefine marriage based on society's increasing acceptance of homosexuality and gender equality. Then, contradicting themselves, they suggest that the rickety supports for

heterosexual marriage are anti-gay animus and lingering oppressive gender-stereotypes. In Plaintiffs' eagerness to achieve their view of society, they encourage this Court to legislate by judicial fiat. Redefining marriage to include same-sex unions would require this Court to mandate social policy against the clear will of the people.

When the United States Supreme Court repealed anti-sodomy and anti-miscegenation laws (cases upon which Plaintiffs' primarily rely), a necessary social predicate was already in place. A public consensus had been reached that such laws were no longer permissible. That social predicate is missing here. In fact, in just the last ten years, and as recently as the November elections, the American people overwhelmingly reaffirmed the "one man and one woman" limitation at the ballot box.

Finally, in the whirlwind of this controversy, there is a fundamental principle that ought to remain firmly anchored to the ground. The State's authority to decide the organizing institution of society should not be disturbed unless there is a compelling reason. Recent elections have shown that Democrats, Republicans and Independents believe in marriage between one man and one woman and do not want it changed. Is it dark, anti-gay animus or adherence to oppressive gender stereotypes at the bottom of this conviction? Of course not. Voters relied on their own

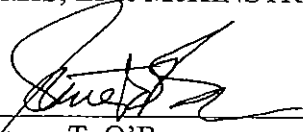
experience and common sense to reach the conclusion that the ideal should be honored and supported, even when it cannot always be attained.

The trial court decisions should be reversed and Plaintiffs' claims should be dismissed.

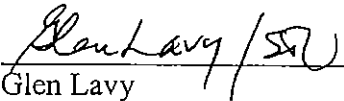
RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of January, 2005.

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