[ ] **EXPEDITE** (if filing within 5 court days of hearing)

[X] Hearing is set:
Date: September 2, 2004
Time: 9:00 a.m.
Judge/Calendar: Hon. Richard Hicks

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

Celia CASTLE and Brenda Bauer; Pamela Coffey and Valierie Tibbett; Gary Murell and Michael Gyde; Christina Gamache and Judith Fleissner; Kevin Chestnut and Curtis Crawford; Jeff Kingsbury and Alan Fuller; Lauri Conner and Leja Wright; Allan Henderson and John Berquist; Marge Ballack and Diane Lantz; Tom Duke and Phuoc Lam; and Kathy and Karrie Cunningham,

Plaintiffs,

v.

State of WASHINGTON,

Defendant.

No. 04-2-00614-4

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

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PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

TABLE OF AUTHORITIES

Cases

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Statutes

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Other Authorities

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

I. INTRODUCTION

Our State Constitution assures that all Washington citizens enjoy rights and privileges granted by the State equally. Our Constitution prohibits the enactment of laws that discriminate against Washington citizens on the basis of sex for any reason or on the basis of sexual orientation absent a compelling reason. Our Constitution contains a paramount commitment to protect individual rights, including the rights of privacy and autonomy.

Yet, the State's marriage laws violate these fundamental constitutional requirements. The State denies the right to marry to a class of Washington citizens, same-sex couples, without a reasonable basis. The marriage laws discriminate on the basis of gender. They also discriminate on the basis of sexual orientation without a rational basis, let alone a compelling one. Finally, the State's marriage laws intrude on individual rights, including the right to privacy and autonomy.

In this case, gay and lesbian couples in committed relationships seek to exercise the civil right to marry or to have the State recognize lawful marriages performed in other jurisdictions. The State's marriage laws deny these plaintiffs and other loving couples those rights, in violation of our State Constitution. Plaintiffs ask that the State's marriage laws be struck down and the civil rights, benefits, and incidents of marriage be extended to all our state's citizens, without regard to sex or sexual orientation.

II. STATEMENT OF UNDISPUTED FACTS

Plaintiffs include a police officer, a firefighter, a photographer, a school teacher, a retired judge, a nurse, two Vietnam veterans and others.[1]

[1] *See* Declarations of: Judith Fleissner ("Fleissner Decl.") at ¶ 4; Celia Castle ("Castle Decl.") at ¶ 3; Curtis Crawford ("Crawford Decl.") at ¶ 3; Lauri Conner ("Conner Decl.") at ¶ 2; Valerie Tibbett ("Tibbett Decl.) at ¶ 2; John Berquist ("Berquist Decl.") at ¶ 4; Gary Murrell ("Murrell Decl.") at ¶ 2; Tom Duke ("Duke Decl.") at ¶ 2.

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

They are citizens from all over the State of Washington, from Seattle to Spokane and from Friday Harbor to Hoquiam.[2] Plaintiffs total eleven couples in all: Celia Castle and Brenda Bauer; Pamela Coffey and Valerie Tibbett; Gary Murrell and Michael Gyde; Judith Fleissner and Christina Gamache; Curtis Crawford and Kevin Chestnut; Lauri Conner and Leja Wright; Phuoc Lam and Tom Duke; Jeff Kingsbury and Alan Fuller; Karrie Cunningham and Kathy Cunningham; John Berquist and Allan Henderson; and Marge Ballack and Diane Lantz.

Despite their many unique characteristics, these Washington citizens have one thing in common – they want to marry the person they love. Their families, whether two young women raising grade-school children or two men nearing retirement, want the State of Washington to recognize the relationships they have formed just as it does for their heterosexual friends and neighbors.[3]

Many of the Plaintiffs have faced obstacles they would not have endured if the State allowed them to marry or recognized their marriages. *See, e.g.*, Coffey Decl. at ¶ 5 (partner of 32 years was unable to find the Durable Powers of Attorney during a medical emergency); Gamache Decl. at ¶ 5 (extended legal process to establish joint parental rights); Chestnut Decl. at ¶ 6 (unlike heterosexual co-workers, plaintiff would be charged taxes on health insurance for his partner of nineteen years); Tibbett Decl. at ¶¶ 10-13

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[2] *See e.g.*, Declarations of: Kevin Chestnut ("Chestnut Decl.") at ¶ 2; Diane Lantz ("Lantz Decl.) at ¶ 1; Pamela Coffey ("Coffey Decl.") at ¶ 5; Murrell Decl. at ¶ 4.

[3] *See e.g.*, Declarations of: Brenda Bauer ("Bauer Decl.") at ¶¶ 3, 5; Christina Gamache ("Gamache Decl.") at ¶¶ 5, 7 and 8; Murrell Decl. at ¶ 3; *see generally*, Fleissner Decl. at ¶ 7; Declaration of Marge Ballack ("Ballack Decl.") at ¶ 5; Crawford Decl. at ¶ 8.

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

(partners had to hire attorney to draft numerous legal documents to receive some of the legal benefits married couples enjoy automatically).

The State's refusal to recognize gay and lesbian marriages has facilitated discrimination against some of the Plaintiffs. *See, e.g.*, Declaration of Jeff Kingsbury ("Kingsbury Decl.") at ¶ 6 (real estate agent advised couple to "mask" their relationship during efforts to purchase a home); Bauer Decl. at ¶8 (when their daughter's leg was broken, hospital staff member insisted on knowing which one of them was the "real" mom).

Some of the Plaintiffs have already been legally married in British Columbia and Oregon.[4] One couple waited in the San Francisco rain for hours to be married.[5] Others remain hopeful that the State will allow them to marry in Washington, amongst their communities, families, and friends.[6] And a few have either had, or are considering, religious ceremonies to complement their legal ones.[7]

Finally, Plaintiffs want the rights associated with marriage. They want to make health care decisions for their life partners during medical emergencies.[8] They want to be treated as legal relations without incurring the expense of hiring attorneys to draft and revise durable powers of attorney, health and death directives, wills and trusts.[9] They want their life partners to

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[4] Ballack Decl. at ¶ 2; Lantz Decl. at ¶ 2; Chestnut Decl. at ¶ 3; Crawford Decl. at ¶ 8. Bauer Decl. at ¶ 2; Castle Decl. at ¶ 2; Gamache Decl. at ¶ 3; Fleissner Decl. at ¶ 2.

[5] Declaration of Karrie Cunningham at ¶ 4.

[6] *See, e.g.*, Kingsbury Decl. at ¶ 7; Conner Decl. at ¶10; Murrell Decl. at ¶ 6; Duke Decl. at ¶ 5.

[7] *See, e.g.*, Tibbett Decl. at ¶ 6; Castle Decl. at ¶ 6; Conner Decl. at ¶ 4.

[8] *See, e.g.*, Chestnut Decl at ¶ 4; Coffey Decl. at ¶ 5; Berquist Decl. at ¶4.

[9] *See, e.g.*, Tibbett Decl. at ¶¶ 10-13; Crawford Decl. at ¶ 5.

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

receive employment benefits that currently only opposite-sex couples automatically enjoy.[10] They want to raise a family without having to adopt their own children.[11] In other words, Plaintiffs want to be married or have their marriages recognized in Washington.

III. QUESTIONS PRESENTED

The State's statutory and common law prevent Plaintiffs from marrying their chosen partners. The questions presented to this Court are whether these laws: (1) violate Art. I, 4 12 of the Washington Constitution; (2) constitute unlawful sex discrimination under the Washington Equal Rights Amendment; or (3) violate Plaintiffs' fundamental rights of privacy and autonomy guaranteed by the Washington Constitution, including Art. I, § 3, Art. I, § 7, Art. I, § 30, and Art. I, § 32.

IV. LEGAL ARGUMENT

A. Civil Marriage is a Unique Legal Status Conferred by the State that Has Changed Over Time and is Subject to Constitutional Limitations.

1. Civil marriage is a creature of state law.

Marriage is "properly characterized as a legal status." *In re Marriage of J.T.*, 77 Wn.App. 361, 363, 891 P.2d 729 (1995). When spouses marry, they enter into "a new relation[ship], the rights, duties, and obligations of which rest, not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations." *Id.* at 363-64 (citations omitted). The creation and termination of an individual's marital status is determined solely by the procedures set forth in civil law, namely ch. 26.04 RCW. Once created, the "legal duties

[10] Castle Decl. at ¶ 4; Fleissner Decl. at ¶¶ 6, 7.

[11] Gamache Decl. at ¶ 5; Bauer Decl. at ¶ 5; Conner Decl. at ¶ 8.

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

and rights of the parties with respect to the marital relationship are determined by statute and may be altered by the legislature after the marriage is contracted." *Wash. Statewide Org. of Stepparents v. Smith,* 85 Wn.2d 564, 569, 536 P.2d 1202 (1975). The State, in short, grants the right to marry and defines its obligations and benefits.

In addition to this accepted definition of "civil marriage," most religions include rituals or sacraments for joining couples that are also referred to as "marriage." This lawsuit deals only with civil marriage and has no bearing on the ability of religious faiths to conduct marriage ceremonies or recognize marriages.[12]

2. Marriage conveys to each spouse unique legal incidents.

Washington law governs the spouses' relationship with each other as well as their relationships with third parties. Many of these rights and responsibilities are unique to the marriage relationship. To take but one example, spouses may not be compelled to testify against each other. *State v. Sanders*, 66 Wn.App. 878, 833 P.2d 452 (1992). The exceptional spousal privilege "reflects the 'natural repugnance' of the direct or indirect incrimination of one spouse by the other, and protects the witness spouse from the dilemma of committing perjury, being in contempt of court, or jeopardizing the marriage." Comment, *The Marital Privileges in Washington Law*: *Spouse Testimony and Marital Communications*, 54 Wash. L. Rev. 65, 70 (1978). Unlike spouses, unmarried couples do not enjoy a similar privilege, regardless of the duration and scope of their relationship. *State v.*

[12] Some sects limit religious unions to opposite sex couples. Many other sects bless religious marriages or unions between same-sex couples. *See e.g.*, Castle Decl. at ¶ 6 (Quakers); Tibbett Decl. at ¶ 6 (Buddhists); http://www.advocate.com/html/stories/811/811_judaism.asp (reformed Judaism); http://www.cnn.com/2004/LAW/03/15/gay.marriage.ny.ap/.("Unitarians have backed gay rights since 1970, and not only endorse same-sex unions, but some churches also offer the couples premarital counseling")

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Cohen, 19 Wn.App. 600, 608, 576 P.2d 933 (1978) (spousal privilege did not apply to partner who cohabited with defendant and was parent of his children); Fleissner Decl. at ¶ 7 (police officer frequently testifies and could be compelled to reveal intimate conversations with partner of fourteen years).

Plaintiffs are directly affected by the State's exclusion of their relationships from laws recognizing married couples. For example, as part of the Law Enforcement Officers' and Fire Fighters' Retirement System, the State provides surviving spouse benefits. *See, e.g.*, RCW 41.26.160(1). Plaintiff Celia Castle is a fire fighter, and plaintiff Judith Fleissner is a police officer. Yet, unlike the spouses of their colleagues, Celia's and Judith's partners are excluded from this important benefit. Castle Decl. at ¶ 4; Fleissner Decl. at ¶¶ 6-7. Numerous other government benefits are likewise available only to individuals who are married. *See, e.g.*, RCW 49.12.360(1) (family leave available to stepparent, but not to unmarried cohabitant); RCW 4.20.020 (wrongful death claim benefits spouse). In addition to conveying special rights, the State also imposes special responsibilities on individuals who marry. *See, e.g.*, RCW 26.33.150(4) (a married person who wishes to adopt a child must do so jointly with his or her spouse).

In some instances, legal rights that automatically extend to spouses may be simulated by unmarried couples through other means. For example, although they do not benefit from intestate succession, unmarried partners may execute wills in each other's favor. But such estate planning is necessarily more cumbersome and expensive than the automatic operation of the probate laws. *See, e.g.*, Tibbett Decl. at ¶¶ 10-13; Crawford Decl. at ¶ 5. Likewise, unmarried individuals may attempt to convey medical decision-making authority to their partners. *See* Crawford Decl. at ¶ 5 (couple

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

obtained formal documentation after being excluded from emergency room as non-family member). But even after incurring legal and other expenses drafting durable powers of attorneys or other documentation, Plaintiffs continue to face anxiety and uncertainty regarding whether their efforts will be effective. *See, e.g.,* Tibbett Decl. at ¶ 14; Coffey Decl. at ¶ 5; Bauer Decl. at ¶ 6. As these experiences illustrate, there is no substitute for the unique recognition and legal protections provided by the State to married couples.

3. Marriage in Washington today is a gender-neutral legal status that is no longer limited on the basis of religious, racial, economic, gender, or parental status.

In 1998, the state's marriage laws were amended to limit marriage only to couples comprised of "a male and a female." RCW 26.02.010(1) and .020(1) (c). (The 1998 amendment is called the Defense of Marriage Act or DOMA.) The stated purpose of limiting marriage on the basis of sex and sexual orientation was to "reaffirm" the State's "historical commitment to the institution of marriage as a union between a man and a woman as husband and wife." Laws of 1998, ch. 1, §2 (historical note to RCW 26.04.010). But the civil right of marriage is not merely a creature of historical tradition. During earlier chapters of our State's history, the State denied the civil right of marriage on the basis of race, religion, and other factors. Like the laws at issue here, previous exclusionary definitions of marriage were premised on tradition, perceptions about natural law, and prejudice. A history of exclusion, however, cannot justify present discrimination. *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 2483, 156 L.Ed.2d 508 (2003) (citing *Bowers v. Hardwick,* 478 U.S. 186, 216, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Stevens, J., dissenting)). Fortunately, the legislature has acted to bring equality to most marriage statutes. And when presented with legal

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

challenges to discriminatory laws and common law rules, the courts of the State have fulfilled their role of ensuring equality under the law.

Race. Historically, the legal definition of marriage excluded any union between spouses of different races. Although Washington repealed its laws limiting marriage on the basis of race prior to statehood, *compare* Wash. Terr. Laws of 1888 § 2380 *et seq.*, *with* Wash. Terr. Laws of 1866 p. 81, courts continued to enforce territorial miscegenation laws even decades later. *See, e.g., Follansbee v. Wilbur,* 14 Wash. 242, 44 P. 262 (1896) (Native American woman denied inheritance because her marriage to Caucasian man occurred when miscegenation law was in force). Washington courts now recognize that limiting marital rights on the basis of the race of one's chosen spouse would be unconstitutional. *See, e.g., City of Bremerton v. Widell,* 146 Wn.2d 561, 580, 51 P.3d 733 (2002) (citing *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)).

Religion. In earlier centuries, the legal status of marriage was subject to canon law. *See Stanard v. Bolin*, 88 Wn.2d 614, 617, 565 P.2d 94 (1977) (marital matters formerly within jurisdiction of ecclesiastical courts) (citing H. Clark, *The Law of Domestic Relations in the United States* 2 (1968)). The State accommodates individual religious belief by including clergy among those persons authorized to solemnize a legal marriage. RCW 26.04.050. Nevertheless, in this State, marriage is "governed by civil law rather than by ecclesiastical law." *Stepparents,* 85 Wn.2d at 659. The State cannot limit access to civil marriage (or divorce) in order to enforce a particular religious definition of marriage. *See, e.g.,* Const. art. I, § 11; *accord Williams v. Williams,* 543 P.2d 1401, 1403 (Okla. 1975) (dissolution of civil marriage did not violate plaintiffs' religious freedom; "she still has her constitutional

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

prerogative to believe that in the eyes of God, she and her estranged husband are ecclesiastically wedded as one").

Sexual intimacy. In the past, marriage required sexual intimacy, and sexual conduct was limited by law to marriage. *See former* RCW 9.79.110 (adultery a crime); *Grover v. Zook,* 44 Wash. 489, 498, 87 P. 638 (1906) (the "reason of marriage" is "the avoiding of fornication"); Emily R. Brown, *Changing the Marital Rape Exception*, 18 Am. J. Trial Advoc. 657, 658 (1995) ("Since any sexual relation, voluntary or involuntary, outside of marriage was unlawful, all sexual acts within marriage were, by definition, lawful"). The State enacted laws regulating particular private, consensual sexual practices. *See former* RCW 9.79.100 (sodomy a crime). Each of those legal limitations on marriage and on sexual intimacy, however, has now been removed, either judicially or by the legislature. *See, e.g., Tisdale v. Tisdale,* 121 Wash. 138, 141, 209 P. 8 (1922) (valid marriage does not require sexual consummation); *see* Laws of 1975, ch. 260 (revised Washington Criminal Code repealed adultery, fornication, and sodomy criminal statutes); *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980) (abolishing tort of alienation of affections); *see also Lawrence,* 123 S.Ct. at 2484 (laws prohibiting same-sex activities violate fundamental right of privacy). An adult's decisions regarding both sex and marriage are among his or her most private decisions – but sex and marriage are not the same thing. Today, sexual intimacy is neither limited to nor required in marriage. *See, e.g., Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (prisoners have a right to marry, even though they may never cohabitate with spouse).

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Procreation and parenting. Another traditional purpose of marriage was described as "the procreation of children, according to the evident design of Divine Providence." *Grover,* 44 Wash. at 498. Today, fertility does not limit the ability to marry. Post-menopausal women and men with vasectomies are allowed to marry. Applications for marriage licenses do not require the applicants to attest to their fertility. *See, e.g., In re Guardianship of Hayes,* 93 Wn.2d 228, 235, 608 P.2d 635 (1980) (noting repeal of laws limiting marriage on the basis of fertility). To the contrary, the State may not interfere with an individual's deeply personal decision whether to procreate – within or outside of marriage. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (state cannot bar sale of contraceptives to married couples); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (same for unmarried couples); *Moringa v. Vue,* 85 Wn.App. 822, 834, 935 P.2d 637 (1997) ("The decision to procreate involves intimate and personal choices which are central to the notion of liberty").

The law also recognizes that regardless of marital status, parenthood itself is not limited to procreation. *See, e.g.,* RCW 49.12.350 (Family Leave Act states, "the bonding that occurs between a parent and child is important to the nurturing of that child, regardless of whether the parent is the child's biological parent and regardless of the gender of the parent"); RCW 26.33.020(8) (Adoption Act defines "Parent" as "the natural or adoptive mother or father of a child"). Moreover, in recent years both law and society have increasingly recognized that the parent-child relationship is not limited either to the providers of genetic materials (sperm and egg) or the role of gestation and childbirth. *See, e.g.,* RCW 26.26.011(4) (defining "assisted reproduction"); RCW 26.26.101(1) (d) (intended mother of

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

surrogacy contract is a parent); *In re Parentage of L.B.*, No. 52151-9-I, 2004 WL 938361 (Div. I May 3, 2004) (common law of Washington recognizes "de facto" nonbiological parents). Parenting does not depend on genetics, gestation, or childbirth.

For those married couples with children, Washington's marriage laws sustain families by providing important legal protections for a spouse's relationship with his or her biological and adoptive children. Like married and unmarried heterosexual couples, lesbians and gay men are raising children. Indeed, for several of the Plaintiffs, protecting their children is the most important reason for seeking to marry or to have their marriages recognized by the State. (Gamache Decl. at ¶ 5; Bauer Decl. at ¶ 5; Conner Decl. at ¶ 8). Nevertheless, children – genetic, assisted, or adoptive – are not limited to married couples. And marriage is not limited to couples intending to have children.

Gender. Perhaps the most dramatic change in laws governing marriage has been in the rejection of stereotypes regarding the roles of men and women. Western society has not always shared today's concept of marriage as a partnership between equals. Marriages were often viewed as "property" transactions. *Stanard*, 88 Wn.2d at 620. Arranged marriages were commonplace, with brides having little say in their choice of grooms. Marriage was viewed as a decision to be made among men with women as the object, complete with financial arrangements regarding dowries. Married women were restricted in their ability to own property or exercise other types of familial authority that we now consider part and parcel of a marital community. *See, e.g., former* RCW 26.16.030 ("The husband shall have the

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

management and control of community personal property, with a like power of disposition as he has of his separate personal property").

Some of the progress toward sex equality in marriage occurred in the first century of Statehood. *See, e.g., Schramm v. Steele,* 97 Wash. 309, 166 P. 634 (1917) ("While the husband is a statutory agent for the community, there is an absolute equality of ownership and rights in all community property, there being no distinction whatever so far as concerns the equal property interests of husband and wife"). Much of the change to marriage laws, however, has occurred only in recent years. For example, the legislature has repealed various statutory distinctions between male and female spouses. *See, e.g.,* Laws of 1972, ch., § 108 (ending husband's role as manager of community property); *cf. Stanard*, 88 Wn.2d at 620 (abolishing recovery for loss of marital expectation because marriage is no longer a financial transaction).

In the three decades since the ERA was enacted, Washington courts have also acted to ensure that the status of civil marriage no longer discriminates on the basis of sex. For example, in 1980 the Washington Supreme Court held that the availability of a loss of consortium claim would no longer be limited on the basis of the spouse's sex. *Lundgren v. Whitney's, Inc.,* 94 Wn.2d 91, 96, 614 P.2d 1272 (1980) (overruling 1953 decision on the grounds that the "judicial classification by sex" violated the ERA); *see also Murray v. Murray,* 28 Wn.App. 187, 190, 622 P.2d 1288 (1981) (ending "tender years doctrine" favoring mothers in custody disputes); RCW 26.09.002 (gender neutral "best interests of child" standard for custody matters). As the Washington Supreme Court has noted, "[n]owhere in the common-law world – indeed in any modern society – is a woman regarded as

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being...." *State v. Thornton*, 119 Wn.2d 578, 582, 835 P.2d 216 (1992) (citing *Trammel v. United States*, 445 U.S. 40, 44, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980)). Thus, over the years the legislature and the courts have replaced sexist stereotypes about marital decision-making with an "equal manager" concept. *In re Marriage of Mattson,* 107 Wn.2d 479, 484, 730 P.2d 668 (1986).

As these examples demonstrate, notwithstanding traditional roles and stereotypes, in Washington, an individual's fundamental right to marry is no longer limited on the basis of race, religion, sexual intimacy, procreation, parental status, or sex. Instead, modern marriage is "the result of that complex experience called being in love." *Stanard,* 88 Wn.2d at 622. Marriage in this State is now the legal status between two equal spouses who fall in love and choose to seek the State's recognition of their mutual commitment. It is that legal status that is before this Court.

B. Washington's Marriage Law Denies a Fundamental Privilege of Citizenship to a Class of Washington Citizens in Violation of Art. I, § 12 of the Washington Constitution

1. Art. I, § 12 of the Washington Constitution is interpreted independently of the Fourteenth Amendment of the United States Constitution.

The Privileges and Immunities Clause of the Washington Constitution states: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." Art. I, § 12. Recently, the Supreme Court confirmed that this clause is interpreted independently of the United States Constitution's equal protection guarantees. *Grant County Fire Protection District v. City of Moses Lake,*

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

150 Wn.2d. 791, 806, 83 P.3d 419 (2004). The test set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), reaffirms that the Washington Constitution guarantees protection of the right to equality in marriage independent of the U.S. Constitution.

The six, non-exclusive "*Gunwall* factors" are: (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) whether the matter is of particular state and local concern. *Gunwall*, 106 Wn.2d at 58. All of the *Gunwall* factors favor an independent constitutional analysis in this case.

The first *Gunwall* factor looks to the language of the clause at issue, namely, whether the text of the Washington Constitution can "provide cogent grounds for a decision different from that which would be arrived at under the federal constitution." 106 Wn.2d at 61. Art. I, § 12 provides cogent grounds for Plaintiffs' argument because Washington currently grants to heterosexuals, both as individual "citizens" and as a "class of citizens," the privileges and immunities of marriage upon terms that do not "equally belong" to all of the state's citizens without regard to sexual orientation.

Factor two asks the Court to compare Art. I, § 12 to its federal counterparts. Art. IV, § 2 of the federal constitution addresses interstate relations, mandating that states not withhold privileges and immunities from out-of-state citizens. The Fourteenth Amendment requires states to respect the privileges and immunities bestowed by the federal government. By contrast, Art. I, § 12 of the Washington constitution addresses equality of citizens within the state. The Fourteenth Amendment's "equal protection of

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
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the laws" requirement is different than the state language forbidding the grant of "privileges and immunities" on terms that do "not equally belong" to all.

The third *Gunwall* factor looks to constitutional history to discern whether Washington's framers intended an independent constitutional analysis. *See Gunwall*, 106 Wn.2d at 61. Art. I, § 12 of the Washington Constitution was modeled after the Art. I, § 20 of the Oregon State Constitution. *Grant County*, 150 Wn.2d at 807 & n. 11 (citing *State v. Smith*, 117 Wn.2d 263, 285 (1991) (Utter, J., concurring)); THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 501 n.2d (Beverly Paulik Rosenow ed., 1999). Thus, interpretations of the Oregon privileges and immunities clause provide Washington Courts with guidance. *Grant County,* 150 Wn.2d at 808. Oregon also interprets its privileges and immunities clause independently from the federal equal protection clause. *See, e.g., State v. Freeland*, 295 Or. 367, 667 P.2d 509 (1983).

Further, the history of Washington's clause differs from that of the federal equal protection clause. The framers of the Washington Constitution were concerned not merely with discrimination, but also with the undue granting of special privileges. *See Grant County*, 150 Wn.2d at 808; *Smith*, 117 Wn.2d at 283 (Utter, J. concurring). "The historical context and the linguistic differences indicate the Washington State provision requires an independent analysis when the issue concerns favoritism." *Grant County,* 150 Wn.2d at 809.

The fourth *Gunwall* factor directs the Court to examine pre-existing state law and consider the degree of protection that Washington has historically given in similar situations. *Gunwall*, 106 Wn.2d at 62. In the case of the privileges and immunities clause, the state recognition that

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
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limitations were placed on the government's ability to grant special privileges to certain individuals or groups dates from before the adoption of the Constitution. *Grant County*, 150 Wn.2d at 810. Further, early case law interpreted the privileges and immunities clause independently from the federal provision. *Id.*

Moreover, Washington has traditionally afforded broad protection to individuals' ability to marry and form intimate relationships. Its original marriage statute contained no express restrictions other than consanguinity, bigamy and age of consent. Laws of 1854, p. 404. Washington has also historically regulated and protected marriage independent of federal direction. It repealed its miscegenation statute prior to statehood and, thus, well before the United States Supreme Court declared such laws unconstitutional. *See* Wash. Terr. Laws of 1888 § 2380 *et. seq.*; Wash. Terr. Laws of 1866 p. 81; *Loving*, 388 U.S. 1. It repealed its sodomy statute decades before the United States Supreme Court declared those laws unconstitutional. *See* Laws of 1975, ch. 260; *Lawrence*, 123 S.Ct. 2472. Pre-existing state law favors a separate analysis under Art. I, § 12. *Id.* at 811.

The fifth *Gunwall* factor compares the structure of the federal and state constitutions and supports an independent interpretation. *See Seeley v. State*, 132 Wn.2d 776, 789-790, 940 P.2d 604 (1997); *see also Smith*, 117 Wn.2d at 286. "The federal constitution is a grant of enumerated powers, the state constitution serves to limit the sovereign power." *Gunwall*, 106 Wn.2d at 62.

The sixth *Gunwall* factor supports independent analysis of issues of state or local concern instead of national concern. *Gunwall*, 106 Wn.2d at 62. Marriage is a traditional province of the states. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) (upholding

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925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
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the 'domestic relations exception' to federal jurisdiction); *Rose v. Rose*, 481 U.S. 619, 625, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987) (domestic relations law traditionally left to state regulation); *Barber v. Barber*, 62 U.S. 582, 21 How. 582, 16 L.Ed. 226 (1859) (federal courts lack jurisdiction over dissolution actions). State laws are allowed to regulate marriage to the extent they do not violate the federal constitution. *See Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Marriage, therefore, falls within the traditional province of the states and thus supports a distinct state constitutional analysis.

The *Gunwall* factors are not exclusive. Other factors that favor an independent interpretation in this case can be found elsewhere in Article I of Washington's constitution, its "Declaration of Rights." Art. I, § 1 commences the document by noting that governments "are established to protect and maintain individual rights." By placing individual liberties at the forefront of the constitution--rather than in a series of amendments--the Washington Constitution reflects the paramount concern for the rights of citizens. Our frontier history reflects a concern for individual well-being against potential governmental infringement. Such concerns are reiterated in Art. I, § 32, which reminds courts that "a frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Similarly, Art. I, § 30 reminds courts that "the enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people."

All of the *Gunwall* factors compel an independent analysis of Plaintiffs' rights of equality. Under that independent analysis, the State

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SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

cannot constitutionally grant the privileges and immunities inherent in the fundamental right of marriage only to a selected class of its citizens.

2. The State grants the privileges and immunities of marriage unequally among its citizens.

By its terms, Art. I, § 12 prohibits the State from granting "privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Privileges and immunities are "those fundamental rights which belong to the citizens of the state by reason of such citizenship." *Grant County*, 150 Wn.2d at 812-813 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)); *see also State ex. rel. Cruikshank v. Baker*, 2 Wn.2d 145, 150-151, 97 P.2d 638 (1940). Among these fundamental rights of citizenship are the rights of marriage, privacy and autonomy. Thus, the State's marriage laws must grant the privilege of marriage, and its associated rights and benefits, equally to all the State's citizens. Because the marriage laws grant the privileges of marriage only to heterosexual couples to the exclusion of lesbian and gay couples, the laws violate Art. I, § 12.

a. Marriage, Privacy and Autonomy are fundamental rights protected by Art. I, § 12.

Marriage is "one of the basic civil rights of man." *Loving v. Virginia*, 388 U.S. at 12.[13] Fundamental rights and liberty interests are generally those identified in the Bill of Rights as well as those found to be "deeply rooted in this Nation's history and tradition . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258,

[13] A long line of decisions confirm the enduring fundamental nature of this right. *See, e.g., Maynard v. Hill*, 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1888); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Turner*, 482 U.S. at 97; *Zablocki*, 434 U.S. at 384; *Skinner*, 316 U.S. at 541.

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TELEPHONE: (206) 623-7580
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138 L.Ed.2d 772 (1997) (citations omitted). Thus, using our nation's history, legal traditions, and practices as a guidepost, the United States Supreme Court conferred fundamental-right status on the right to marry, *Loving v. Virginia*, 388 U.S. at 12 (1967), and the right to marital privacy, *Griswold*, 381 U.S. at 485 (1965). Even before these declarations of marriage as a fundamental right under the Fourteenth Amendment, a line of cases beginning with *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), placed the right "to marry" as a liberty interest "essential to the orderly pursuit of happiness by free men." *Id.* at 399.

Against this national backdrop, our own courts have held that marriage is a fundamental right of state citizenship in Washington. *Levinson v. Washington Horse Racing Commission*, 48 Wn.App. 822, 824-25, 740 P.2d 898 (1987) (right to marry is fundamental in Washington); *cf.* Opp. Or. Att'y Gen., March 12, 2004 (noting that it is "beyond question" that the opportunity to enter a marriage contract is a privilege and immunity protected under Or. Const. Art. I, § 20). Washington courts consider the right to marry so important, the state is constrained in its ability to place even indirect burdens upon it. Thus, in *Levinson*, the court found unconstitutional a regulation that would deny one spouse a horse racing license if the other spouse was disqualified. 48 Wn.App. at 824-27. Similarly, issues related to marriage are an essential part of the fundamental rights of personal privacy and autonomy that are also guaranteed to Washington citizens. *O'Hartigen v. Dep't. of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991) (citing *Whalen v. Roe,* 429 U.S. 589, 599-600, 97 S.Ct. 869, 876-877, 51 L.Ed.2d 64 (1977); *Bedford v. Sugarman,* 112 Wn.2d 500, 509, 772 P.2d 486 (1989)); *see also Voris v. Wash. State Human Rights Commission*, 41 Wn.App. 283,

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704 P.2d 632 (1985) (fundamental right of privacy includes right to govern one's personal and intimate relationships in the home). The Washington Court of Appeals has observed: "This right involves issues related to marriage, procreation, family relationships, child rearing and education." *Ramm v. City of Seattle*, 66 Wn.App. 15, 22, 830 P.2d 395 (1992).

b. The State grants the privileges of marriage to heterosexual couples, while denying the privilege to lesbian and gay couples.

A violation of Art. I, § 12 results when the State grants a "privilege to a class of citizens" to the exclusion of others. *Grant County*, 150 Wn.2d at 812. Washington's marriage law grants the privilege of marriage only to heterosexual couples. As amended in 1998, the marriage law provides: "Marriage is a civil contract **between a male and a female** who have each attained the age of eighteen years, and who are otherwise capable." RCW 26.04.010 (1); Laws of 1998, ch. 1, § 2 (adopting DOMA) (emphasis added). Thus, while heterosexual couples over the age of 18 and otherwise capable may get married in Washington, lesbian and gay couples over the age of 18 and otherwise capable may not.

Moreover, the State recognizes the marriages of heterosexual couples that are solemnized in other jurisdictions. RCW 26.04.020(3). Heterosexual couples married elsewhere enjoy all the incidents of the privilege of marriage in Washington. But, the State expressly forbids recognition of marriages of same-sex couples, even when lawfully created in other jurisdictions. RCW 26.04.020 (1) (c), (3). Four plaintiffs in this action have been lawfully married in British Columbia. Ballack Decl. at ¶ 2; Lantz Decl. at ¶ 2; Chestnut Decl. at ¶ 3; Crawford Decl. at ¶ 8. Four more were married in Oregon, and two in California. *See* Castle Decl. at ¶ 2; Bauer Decl. at ¶ 2;

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TELEPHONE: (206) 623-7580
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Gamache Decl. at ¶3; Fleissner Decl. at ¶ 2; Declaration of Karrie Cunningham at ¶ 4 and Declaration of Kathy Cunningham at ¶ 5. The State denies them the privileges and incidents of marriage – yet heterosexual couples married in British Columbia, Oregon and California are able to enjoy the benefits of Washington marriage fully.

c. There are no reasonable grounds upon which the State may unequally grant the privilege of marriage to opposite-sex couples.

In *Grant County,* in addition to reaffirming the independent meaning of Art. I, § 12, the Supreme Court set out the constitutional test applicable to any unequal grants of privileges. The Court was not faced with the issue of what test applies in a case where a suspect class is denied equal grants of privileges. *Grant County*, 150 Wn.2d at 814 (issue was whether right to recommend annexation was granted unequally to landowners). Here, the State has denied the right of marriage to a suspect class, which should trigger strict constitutional scrutiny. Plaintiffs address strict scrutiny below, but believe that, as in *Grant County*, this Court need not reach the question of strict scrutiny because the state cannot meet the test to justify the unequal grant of privilege even absent a suspect class.

At a minimum, legislation that grants a privilege on an unequal basis cannot pass muster under Art. I, § 12 unless "there [are] reasonable grounds for distinguishing between those who fall within the class and those who do not, and . . . the disparity in treatment [is] germane to the object of the law in which it appears." *United Parcel Serv., Inc. v. Dep't. of Revenue*, 102 Wn.2d 355, 36, 687 P.2d 186 (1984) (citing *Sonitrol N.W., Inc. v. Seattle*, 84 Wn.2d 588, 589-90, 528 P.2d 474 (1974)); *see also State ex. rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936) (overruled on other grounds by *Puget*

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Sound Gillnetters Ass'n v. Moos, 92 Wn.2d 939, 603 P.2d 819 (1979)). The "reasonable grounds" requirement of the Washington Privileges and Immunities clause demands more than federal rational basis review – it requires the State to show a "real and substantial difference bearing a natural, reasonable, and just relation to the subject matter of the act." *Huse*, 187 Wash. at 84.

Because there are **no** reasonable grounds to deny the right to marry, and because the disparity in treatment is not germane to the likely justifications that the State may assert, the State's marriage law is unconstitutional and void under Art. I, § 12. Plaintiffs will respond in reply to whatever specific grounds the State proffers. Yet, as evidenced by recent decisions in other jurisdictions, the grounds often cited cannot withstand even minimal judicial scrutiny.

d. Other jurisdictions have rejected irrational state justifications for discriminatory treatment in marriage.

Last year, the Commonwealth of Massachusetts advanced several grounds in defense of its denial of equal marriage rights. The Massachusetts Supreme Judicial Court squarely rejected each of the asserted justifications holding that none passed even rational basis review. The proffered justifications included procreation, child rearing, and protection of the "institution" of marriage. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 962-63 (Mass. 2003).

The reasoning of the *Goodridge* court is compelling, and demonstrates that no reasonable grounds support an unequal grant of marriage rights in Washington. For example, in Washington, as in Massachusetts, procreation is not a reasonable ground to deny the right to marry, because it is not the "sine qua non of civil marriage." *Id.* at 961; *see also Baker v. Vermont*, 744

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A.2d 864, 886 (Vt. 1999) (noting an "extreme disjunction" between the classification created by the policy of unequal treatment in marriage and its stated purposes – procreation and child-rearing). The concepts of marriage and family are not based on biology. Fertility is not a requirement to marry in Washington. *See* RCW 26.04.010, 020. Any competent adult, married or not, may adopt a child. RCW 26.33.140. Washington also provides for non-parental custody of children under appropriate circumstances. *See* ch. 26.10 RCW. A child's inheritance rights do not depend on the marital status of his or her parents. RCW 11.04.081. In short, Washington law does not conflate marriage and procreation. As the *Goodridge* court observed: "If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child rearing and the creation of families by noncoital means." 798 N.E.2d at 962.

Moreover, same-sex couples are unquestionably capable of procreation. *See In re Parentage of L.B.*, No. 52151-9-I, 2004 WL 938361 (Div. I May 3, 2004) (partner in lesbian couple becomes pregnant through artificial insemination); *State ex rel. D.R.M. v. Wood*, 109 Wn.App. 182, 34 P.3d 887 (2001) (same). For example, Plaintiffs Judy Fleissner and Chris Gamache have two children together. *See* Gamache Decl. ¶¶ 3-5. Both children have the same biological donor, a friend of the family. *Id.* The mere fact that some same-sex couples rely on lawful reproductive technology does not mean they do not procreate. Many heterosexual couples rely on the same technology. And Washington law explicitly provides for assisted reproduction and surrogate parenting. *See* RCW 26.26.011(4) and .210 *et. seq.; In re Parentage of J.M.K.*, No. 29655-1-II, 2004 WL 951687 (Div. II,

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925 FOURTH AVENUE
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TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

May 04, 2004) (artificial insemination); *In re Marriage of Litowitz,* 146 Wn.2d 514, 48 P.3d 261 (2002) (in vitro fertilization).

Nor can the closely related rationale of child rearing serve as a reasonable ground to support unequal marriage rights. Children are raised in a variety of settings, not all of which involve heterosexual biological parents. "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Goodridge*, 798 N.E.2d at 963 (quoting *Troxel v. Granville*, 530 U.S. 57, 63, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). Washington law recognizes that "a child need not have two parents." *D.R.M.*, 109 Wn.App. at 190.

Biology does not dictate good parenting. Indeed, Washington courts recognize that, among many factors determining the best parent, the most important is the child's relationship with the parent. *See In re Marriage of Kovacks*, 121 Wn.2d 795, 800, 854 P.2d 629 (1993). In Washington, an unfit biological parent may lose custody of his or her child. *See In re Custody of Stell*, 56 Wn.App. 356, 783 P.2d 615 (1989); *see also McDaniels v. Carlson*, 108 Wn.2d 299, 738 P.2d 254 (1987) (blocking paternity action of unfit biological father). If it is in the best interests of the child, courts prefer same-sex couples over different sex couples. *See, e.g., In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001) (second adoption by same-sex partner of adoptive parent in best interest of child); *Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. A.D. 1995) (adoption by same-sex partner of biological mother in best interest of children); *accord Goodridge*, 798 N.E.2d at 963 (describing analogous laws and standards in Massachusetts).

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These concepts found recent expression in *In re Parentage of L.B.*, 2004 WL 938361, which held that the common law of Washington recognizes the status of "de facto" parents who lack a genetic connection with the child. In *L.B.*, a lesbian couple in a long-term relationship decided to have a baby together through artificial insemination of one partner. The Court determined that where the non-biological mother had been a part of this child's life from the beginning with the consent of the biological mother, and also had a close and continuing parent-like relationship with the child, that woman will be recognized as a legal mother as a matter of Washington common law. *Id.* at *15("[R]ecognition of de facto parentage, in appropriate circumstances such as those alleged in this case, is in accord with existing Washington family law and reflects the evolving nature of families in Washington.") The Court saw no barrier in the fact that the child would have two women as legal parents. Because the State recognizes by its own statutes and common law that nontraditional families and same-sex couples can be good parents, parenting cannot serve as a reasonable ground to deny the right of marriage to same-sex couples.

Finally, protection of the historical "institution" of marriage cannot justify discrimination against Plaintiffs any more than it could justify the perpetuation of miscegenation laws. "[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Goodridge*, 798 N.E.2d at 961 n. 23. The invocation of exclusionary traditions, no matter how entrenched, is merely discrimination without reason, which cannot withstand any level of constitutional scrutiny. While "[p]rivate biases may be outside the reach of the law ... the law cannot, directly or indirectly, give them effect." *Palmore*

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TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

v. Sidoti, 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Accordingly, legislative classifications "based on prejudice or bias [are] not rational as a matter of law." *Miguel v. Guess*, 112 Wn.App. 536, 553, 51 P.3d 89 (2002) (citing, *inter alia*, *Romer v. Evans*, 517 U.S. 620, 633-34, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)). Put another way, discrimination for its own sake is unconstitutional. *Romer*, 517 U.S. at 635.

In sum, laws that exclude same-sex couples from marriage solely on the basis of their sexual orientation are not predicated on any rational basis. *Goodridge*, 798 N.E.2d 941; *Baker*, 744 A.2d at 885; Opp. Or. Att'y Gen., March 12, 2004. Because rational basis is a lesser standard of review than the showing of reasonable grounds required under Art. I, §12, the State's marriage laws offend our privileges and immunities clause as a matter of law.

3. The State's marriage laws' use of a suspect classification to deny the privilege of marriage also in violation of Art. I, § 12.

As noted above, the language and history of Art. I, § 12 also support another type of analysis that considers the reality that discrimination is most often directed at a particular disfavored group, here gay and lesbian individuals. Because unequal treatment directed at a minority group is a singular concern of the equality laws of the state and nation, courts impose strict scrutiny when it is evident.[14]

When the legislature creates a distinction using a suspect classification, Washington courts have traditionally employed strict scrutiny. *See, e.g, State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under strict scrutiny review, the law in question must serve a compelling

[14] If this Court concludes, like the Massachusetts Supreme Court, that the reasonable grounds review outlined above disposes of the case, it need not consider strict scrutiny. *See Goodridge*, 798 N.E.2d at 968 (striking statute under rational basis review, and declining to reach question of heightened scrutiny).

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
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TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

state interest. *State v. Ward*, 123 Wn.2d 488, 496, 516, 869 P.2d 1062 (1994). Sexual orientation is a suspect classification under Art. I, § 12. This is evident in light of results reached under the model for the Washington Privileges and Immunities clause, namely Article I, section 20 of the Oregon Constitution. *See Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 446 (Or. App. 1998); *Li v. State of Oregon*, No. 0403-03057 (Circuit Court of Oregon for Multnomah County, April 20, 2004); Opp. Or. Att'y Gen., March 12, 2004.

Oregon courts have expressly held that sexual orientation is a suspect classification for purposes of the privileges and immunities clause in Oregon Const. Art. I, § 20. In *Tanner*, the court held: "the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Tanner*, 971 P.2d at 446. It concluded that sexual orientation is a class that triggers strict scrutiny. In *Li*, following *Tanner,* the court concluded that Oregon's marriage laws "impermissibly classify on the basis of sexual orientation."

Although Washington courts have not yet directly addressed whether sexual orientation is a suspect class under Art. I, § 12, they have examined sexual orientation discrimination with a careful eye. The Court of Appeals recently held that a state actor violates a public employee's civil rights when he or she "treats [a gay employee] differently than it treats heterosexual employees, based solely upon the employee's sexual orientation." *Miguel*, 112 Wn.App. at 554.

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Gays and lesbians are a socially recognized group. They have been subject to adverse social and political pressure. They are the victims of prejudice. *See, e.g.,* Kingsbury Decl. at ¶ 6 (real estate agent advises couple to "mask" their relationship during efforts to purchase a home); Bauer Decl. at ¶ 8 ((when their daughter's leg was broken, hospital staff member insisted on knowing which one of them was the "real" mom); Coffey Decl. at ¶ 4 (form documents do not recognize the existence of her relationship of thirty-two years). Use of sexual orientation should be recognized as a suspect classification.

When a suspect classification is at issue, laws must serve a compelling state interest under strict scrutiny review. *Ward*, 123 Wn.2d 488; *cf. Tanner*, 971 P.2d at 524 (employing strict scrutiny under Or. Const. art. I, §20 based upon suspect class of sexual orientation). Denial of the right to marry does not serve a compelling interest for the same reason it fails to satisfy the reasonable grounds standard above. *See Merseal v. Dep't of Licensing*, 99 Wn.App. 414, 994 P.2d 262 (2000) (noting distinctions in standards of review); *see also Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *on remand* 1996 WL 694235, at *21 (marriage discrimination law fails strict scrutiny review because it was not narrowly tailored to serve compelling state interest); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. 1998) (applying strict scrutiny standard to marriage law discriminating against same-sex couples); *cf. Tanner*, 971 P.2d at 524 ("[W]e must determine whether the fact that the domestic partners of homosexual OHSU employees cannot obtain insurance benefits can be justified by their homosexuality. The parties have suggested no such justification, and we can envision none."). Thus, if this court finds it necessary to reach the question

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

of strict scrutiny, it should find that the state's marriage laws cannot withstand this more searching judicial review.

C. Laws Limiting an Individual's Choice of Spouse on the Basis of Sex Violate the Washington Equal Rights Amendment.

The Equal Rights Amendment ("ERA"), Art. XXXI, § 1, commands that "equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Thus, "the ERA absolutely prohibits discrimination on the basis of sex." *Guard v. Jackson,* 132 Wn.2d 660, 664, 940 P.2d 642 (1997) (citations omitted). This prohibition goes "beyond the equal protection guaranty under the federal constitution," because not even assertions of compelling state interest will permit sex discrimination. *State v. Burch,* 65 Wn.App. 828, 837, 830 P.2d 357 (1992) (forbidding gender-based peremptory challenges).[15]

1. Washington's laws barring Plaintiffs from marrying the person that each loves discriminate on account of sex.

Under the Washington ERA, "if equality is restricted or denied on the basis of gender, the classification is discriminatory." *Burch,* 65 Wn.App. at 837. To discriminate is to "make a difference in treatment or favor on a class or categorical basis." *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 149 Wn.2d 660, 686, 72 P.3d 151 (2003). For example, in *Franklin County v. Sellers,* 97 Wn.2d 317, 646 P.2d 113 (1982), the County refused to hire Ms. Sellars as a counselor because she was a woman. The County wanted to hire a man to work on a team with their current female counselor. The County's "decision to achieve a sexual balance by providing

[15] There is no federal constitutional counterpart to the ERA, so no *Gunwall* analysis is required.

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
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TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

a male counselor and a female counselor resulted in the County refusing to hire Sellars because of her sex." *Sellers,* 97 Wn.2d at 328 (emphasis added).

In this case, the State limits each Plaintiff's "ability to marry the person of their choosing" solely because of the Plaintiff's sex. *City of Bremerton,* 146 Wn.2d at 580. For example, if Tom Duke were a woman, he could marry Phuoc Lam. Because Tom is a man and not a woman, he cannot marry Phuoc. Similarly, if Marge Ballack were a man, her valid marriage to Diane Lantz in British Columbia would be recognized by the State. RCW 26.04.020(3). But because Marge is a woman and not a man her marriage is not recognized. Washington's laws, therefore, discriminate "on account of sex." Art. XXXI, Sect. 1; *see also Bob Jones University,* 461 U.S. 574, 605, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) ("Although a ban on intermarriage or interracial dating applies to all races," it is a "form of racial discrimination"); *Loving v. Virginia,* 388 U.S. 1 (miscegenation laws discriminate on the basis of race, even though members of all races are equally barred from interracial marriage).

2. Washington's marriage laws that discriminate on the basis of sex do not fall within the limited exceptions to the ERA.

The ERA permits discrimination only in very limited situations. First, if a legal classification is "intended solely to ameliorate the effects of past discrimination, it simply does not implicate the ERA." *Southwest Washington Chapter, Nat. Elec. Contractors Ass'n v. Pierce Cty,* 100 Wn.2d 109, 127-28, 667 P.2d 1092 (1983). The affirmative action rationale does not apply here.

The second and only other exception is when the discriminatory State action is based on an actual "physical difference between the sexes that justifies the limitation." *Guard,* 132 Wn.2d at 667. This exception does not

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

apply to marriage laws. To be sure, there are physical differences between the sexes that allow (some) pairs of opposite-sex partners to have unassisted procreation, while same-sex partners cannot. But as explained above, the capacity for unassisted procreation is not a necessary or a sufficient condition for a marriage in Washington. Furthermore, the State's statutes do not distinguish between spouses on the basis of sex, because there is no biological reason to give husbands different legal rights within marriage than wives. *See* discussion *supra* at 11-13. Anatomical differences between the sexes, therefore, cannot justify the laws' discriminatory restriction on an individual's choice of spouse on the basis of sex. *Goodridge,* 798 N.E.2d at 961-62; *Baehr*, 852 P.2d at 60, *Li*, Slip Op. at 9.

In attempting to limit Plaintiffs' choice of spouse on the basis of sex, the State may not rely on tradition or stereotypes regarding the roles of men and women in families. For example, the ERA precludes the "tender years doctrine" favoring mothers in determining the custody of young children. *Murray,* 28 Wn.App. at 190. Although ability to fulfill a "child's need for a warm and loving relationship" remains relevant, the attribute of "mothering" cannot "be considered an attribute confined to the female sex." *Id.* at 190 n.4. Similarly, the ability to be a spouse is not confined to one sex or another, because both men and woman marry. Because there is "no actual difference between the sexes that justifies the limitation," *Guard,* 132 Wn.2d at 667, the State's restriction of Plaintiffs' choice of spouse to opposite-sex individuals violates the ERA.

3. The Court of Appeals' 1974 decision in *Singer v. Hara* does not bar Plaintiffs' ERA claims.

Thirty years ago, Division One of the Court of Appeals held that then-existing Washington laws that restricted marriage to opposite-sex couples did

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

not violate the recently-enacted ERA. *Singer v. Hara,* 11 Wn.App. 247, 522 P.2d 1187 (1974).[16] *Singer* correctly characterized the ERA as barring "laws which differentiate between the sexes" unless "they are based on the unique physical characteristics of a particular sex." *Id.* at 259. But the result in *Singer* was wrong. Because that decision is inconsistent with the Washington Supreme Court's subsequent construction of the ERA, it is entitled to no deference from this Court. *See In re Stranger Creek,* 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis should not apply to decisions that are incorrect or harmful); *cf. Lawrence*, 123 S.Ct. at 2484 (striking down sodomy statute, and overruling *Bowers v. Hardwick* as "not correct when it was decided, and... not correct today").[17]

Singer first found that the law did not discriminate with regard to marriage because "what they propose [a same-sex marriage] is not a marriage." 11 Wn.App. at 255. The Court concluded that plaintiffs could not establish that "a right or responsibility has been denied because the right or responsibility they seek does not exist." *Id.* at 259.

The court's conclusion was in error, especially when considered in light of subsequent case law. The State may not shield itself from scrutiny under ERA on the grounds that it is merely perpetuating existing definitions of terms that happen to be discriminatory. For example, the common law definition of a jury was a panel of men. *See, e.g., Harland v. Territory,* 3 Wash. Terr. 131, 13 P. 453 (1887) (the State may exclude women from juries

[16] Although the *Singer* Plaintiffs raised additional constitutional arguments, none were addressed with the exception of a federal equal protection claim, which Plaintiffs in the present case do not assert. 11 Wn.App. at 260-61 & n.11. Thus, while *Singer* should not bar Plaintiffs' ERA claim for the reasons set out in this section, it does not even touch upon Plaintiffs' remaining claims in this case.

[17] Notably, at the time the plaintiffs in Singer sought a marriage license, the ERA had not yet been enacted. *Compare* 11 Wn.App. at 248 (sought license in 1971) *with* Art. 1, §31 (ERA was approved on November 7, 1972).

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

because a jury by definition had always been composed of men). Nevertheless, the State may no longer constitutionally limit jury service to men. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (excluding women from juries constitutes unconstitutional discrimination). As the Hawaii Supreme Court observed, *Singer*'s refusal to examine the definition of marriage is an "exercise in tortured and conclusory sophistry." *Baehr*, 852 P.2d at 63. It is no more persuasive to argue that marriage is by definition heterosexual than to argue that football is by definition male. *See Blair v. Washington State University,* 108 Wn.2d 558, 566, 740 P.2d 1379 (1987) ("It is stating the obvious to observe that the Equal Rights Amendment contains no exception for football").

Singer also concluded that a definition restricting the ability to marry a member of the same sex is permissible because it is "founded upon the unique physical characteristics of the sexes." 11 Wn.App. at 260. But in the decades since the enactment of the ERA, the Supreme Court has repeatedly held that classifications may not be based on "any traditional discredited sexual stereotype." *Southwest,* 100 Wn.2d at 128. As discussed above, the rights and responsibilities of marriage no longer depend on a spouse's sex.

Singer relied heavily on procreation as the alpha and omega of marriage. As discussed in section IV.A.3 (procreation and parenting), *supra* at 10-11, this premise is factually and legally incorrect. *Singer*'s observation that "it is apparent that no same-sex couple offers the possibility of the birth of children by their union" is belied by the real experience of parents like Plaintiffs Celia Castle, Brenda Bauer, Christina Gamache, and Judith Fleissner. *See also In re Parentage of L.B.*, 2004 WL 938361 (procreation by lesbian family). In any event, individuals are constitutionally guaranteed

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

an ability to marry without reference to procreation, *Turner*, 482 U.S. 78; *Tisdale*, 121 Wash. 138, and to procreate without reference to marriage. *Eisenstadt*, 405 U.S. 438.

Finally, *Singer* is inconsistent with the reality of lesbian and gay life as reflected in families like Plaintiffs. *Singer* was the first case in the nation to address "the legality of same-sex marriage in light of an equal rights amendment." 11 Wn.App. at 250. Much has changed since 1974. Lesbian and gay individuals have become a recognized part of our community. Both the State and the nation have removed other legal barriers to lesbian and gay equality. *See, e.g., Romer,* 517 U.S. at 633 (barring anti-gay initiative); *Lawrence*, 123 S.Ct. 2472 (barring laws limiting private same-sex conduct); *Vasquez v. Hawthorne,* 145 Wn.2d 103, 107, 33 P.3d 735 (2001) (property rules apply irrespective of sexual orientation). Many of the vestiges of legal inequality between the sexes have also disappeared. Marriage itself has been transformed in Washington and elsewhere to a "gender neutral" relationship of equal spouses. *Mattson,* 107 Wn.2d at 484. Some jurisdictions now extend equal marriage rights without regard to sex. *Goodridge,* 798 N.E.2d. at 969-70. Indeed, Plaintiffs include couples whose marriages have already been acknowledged as valid by the courts of our neighboring state and province. *Li*, Slip. Op. at 15; *Barbeau v. British Columbia,* 2003 BCCA 251 (B.C. Ct. App. 2003). The State cannot justify its continued exclusion of Plaintiffs and their children from equal access to the rights and responsibilities of marriage.

The rule of law exists to promote equal treatment. *State ex. rel. Washington State Finance Comm. v. Martin*, 62 Wn.2d 645, 665, 384 P.2d 833 (1963). The State cannot, therefore, rely on *Singer* to promote

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

inequality. "If a rule laid down by the courts proves in time to be a bad one, applying the bad rule evenly does not provide equal justice for all. It may be equal, but it will not be justice." *Id.* at 666. The State's discriminatory marriage law must fall under the ERA properly applied.

D. Washington's Marriage Laws Violate the Rights of Personal Autonomy Protected by the Due Process and Privacy Provisions of the Washington Constitution.

Washington's Declaration of Rights commands the Court to make "frequent recurrence to fundamental principles" to protect "the security of individual right." Art. I, § 32. Indeed, at the heart of the Washington Constitution is the principle that governments exist "to protect and maintain individual rights." Art. I, § 1. The Declaration of Rights then lists twenty-seven rights ranging from traditional legislative restrictions to specific proclamations of individual liberty.

Among the rights expressly identified is the right to due process. The Washington Due Process clause, Art. I, § 3 of the Washington Constitution, provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." Another is the right to privacy. Art. 1, § 7 states that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Together the state constitution's due process and privacy provisions, within the context of the constitution's paramount concern for individual rights, protect one's liberty interest to structure one's life in its most intimate and defining ways, including the choice of one's spouse. This conclusion is supported both by federal and state cases recognizing the protection of privacy, autonomy, fundamental rights and substantive due process.

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1. The Washington Constitution Protects Matters of Personal Liberty against Government Intrusion at least as Zealously, if not More so, than does the Federal Constitution

It is a basic principle of federalism that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). The Court should do so here in the context of privacy and autonomy rights. As set forth above in the *Gunwall* analysis of Art. I, § 12, the state constitution treats the protection of individual rights differently than the federal constitution. Moreover, the language of the state constitution regarding privacy is different from that of the Fourth Amendment. There is no language in the federal constitution that expressly protects privacy outside of the search-and-seizure context. *Cf. Bedford*, 112 Wn.2d at 508 (discussing lack of express privacy provision in federal constitution). In contrast, the heading of Art. I section 7 states: "Invasion of Private Affairs or Home Prohibited", while the body of that section identifies both a person's "home" and "private affairs" as protected by the right to privacy. Thus, the textual language and the textual differences, the first and second *Gunwall* factors, weigh in favor of more expansive privacy rights under state law. (The language of the state due process clause in Art. I, § 3 is admittedly identical to its federal counterpart in the Fifth and Fourteenth Amendments, but it has been given vigorous application in Washington, as noted below.)

Gunwall Factor 3 – constitutional history – also supports more expansive privacy rights. The Washington State Constitutional Convention first considered and then rejected a provision "identical to the fourth amendment to the United States Constitution and rejected it in favor of the

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

present Const. art. I, § 7." *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983) (citing JOURNAL OF WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 at 497 (B. Rosenow ed., 1962)).[18]

Factor 4 – preexisting law – shows that Washington courts construing Art. 1, § 7 have recognized its expansive scope, reaching the personal decisions affecting autonomy. In a variety of contexts, Washington courts have recognized that, pursuant to Art. I, § 7 "a fundamental right of privacy . . . exist[s] in matters relating to freedom of choice regarding one's personal life." *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200 (1991); *In Re Colyer*, 99 Wn.2d 114, 120, 660 P.2d 738 (1983) (right of privacy under Art. I, § 7 gives terminally ill adult a right of autonomy in medical decisions); *State v. Koome*, 84 Wn.2d 901, 530 P.2d 260 (1975) (right of privacy implied by Art. I, § 3 gives unmarried female minor a right of autonomy to obtain abortion without parental consent).

Finally, as noted above, the fifth and sixth *Gunwall* factors support more expansive protection of individual marriage rights than provided in the U.S. Constitution. *See* Section IV.B.1, *supra* at 16-17.

Assessing the *Gunwall* test as a whole, sufficient justification exists for Washington courts to adopt a more expansive view of "private affairs" protection under the Washington Constitution. Washington's express protection of the right to privacy, together with its due process guarantees, shows that the privacy interests in this case deserve, if anything, greater protection than that already conferred under federal law. Nonetheless,

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[18] One court has relied on this constitutional history to suggest that Art. 1, § 7 is therefore limited to search-and-seizure cases. *See In re RRB*, 108 Wn.App. 602, 617, 31 P.3d 1212 (2001). The reasoning in *RRB* has not been subsequently adopted by the Washington Supreme Court and is of questionable validity, because if the Constitutional Convention wanted to limit protection of privacy to search and seizure, it would not have replaced a Fourth Amendment model with text forbidding disturbance of "private affairs".

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

whether our state constitution provides greater protection, or protection commensurate with federal law, the state's marriage laws deny due process and infringe rights of autonomy and privacy.

2. Washington's denial of marriage to gays and lesbians denies privacy and autonomy rights

Our Supreme Court has recognized that due process provides enhanced protections for fundamental rights of privacy and autonomy. These rights include "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Bedford*, 112 Wn.2d at 513 (internal citations omitted). As discussed in Section IV.B.2.a, *supra* at 18-20, marriage is a fundamental right in Washington.

Accordingly, Washington laws restricting marriage implicate a fundamental right and warrant strict judicial scrutiny. *Levinson*, 48 Wn.App. at 824-25 ("[W]hen a statutory classification significantly interferes with the exercise of [the right to marry], it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.") (quoting *Zablocki*, 434 U.S. at 388).

Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to achieve only the compelling state interest involved. *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd sub nom. Troxel*, 530 U.S. 57. There exists no compelling state interest to justify the State's denial of the fundamental right to marry to same-sex couples, any more than reasonable grounds exist to grant unequally the privilege of marriage. *See* Section IV.B.2.c, *supra* at 21-22. To the contrary, the inescapable lesson to be learned from the history of substantive due

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

process protections afforded to marriage at the state and federal level is that that the State's present law cannot stand.

The United States Supreme Court's decision in *Loving*, 388 U.S. 1, is recognized as the cornerstone of due process protection of the right to marry. There, the Supreme Court reviewed and invalidated a state law imposing racial requirements for marriage. A trial court judge in Virginia had convicted Mildred Jeter, a black woman, and Richard Loving, a white man, for violating the state's ban:

> Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id. at 12. In reversing the Lovings' conviction, the Court focused on the racial requirement for marriage in Virginia's law, and in the process made clear that protection of the individual right of choice is inextricably interwoven with the special role of marriage. In declaring that the statute's infringement on the right to marry was unconstitutional under the Fourteenth Amendment's due process clause, it stated:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Under our Constitution, the freedom to marry, or not marry, a person of another race *resides with the individual* and cannot be infringed by the State.

Id. (emphasis added).

In interpreting their respective state constitutions, recent state Supreme Court decisions have relied in part on the logic of *Loving* and its progeny in recognizing the rights of lesbian and gay couples to marry. *See Goodridge*, 798 N.E.2d 941; *Baehr*, 852 P.2d 44; *see also Brause*, 1998 WL 88743.

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

In *Goodridge*, the Massachusetts Supreme Judicial Court likened the bar to same sex marriages to the bans on interracial marriage that were struck in the 1960s. *Goodridge* also noted that in *Lawrence*, the Supreme Court "affirmed that the core concept of common human dignity protected by the Fourteenth Amendment the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner." *Goodridge*, 798 N.E.2d at 948 (citing *Lawrence*, 123 S.Ct. at 2481). *Lawrence* also "reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity." *Id.* The *Goodridge* court aptly noted: "[T]he right to marry means little if it does not include the right to marry the person of one's choice..." *Id.* at 958.

With the exception of sex, restrictions on the choice of marital partner based on identifying characteristics have been eliminated in our society. The remaining limitations are those concerning relational matters such as consanguinity and minority. *Cf. Lawrence*, 123 S.Ct. at 2484 (noting absence of those issues in striking sodomy law). The only Washington citizens who meet all the express statutory requirements for marriage but cannot marry are individuals who are in loving, committed relationships with someone of his or her same sex. Each Plaintiff's choice of marital partner is as much a part of his or her liberty and happiness as it is for any other citizen of this State. *Cf. Bedford*, 112 Wn.2d at 513.

The State's marriage laws fail strict scrutiny, and thus deny the liberty, privacy and autonomy protections afforded by the Washington Constitution.

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

V. CONCLUSION

At stake in this suit are the equal rights of a class of Washington citizens – gay and lesbian individuals – to enjoy the right to marry the person of his or her choosing, and the numerous benefits that accompany the right to marry. No valid basis exists for the State to deny that right. Continued denial of the right to marry violates the Washington Constitution's paramount duty to protect individual rights and assure equal treatment of its citizens. Plaintiffs respectfully request that this Court strike down the language in RCW 26.02.010 and .020 limiting marriage to "a male and a female" and allow Plaintiffs and other loving and committed couples like them to marry and be married with all the benefits and recognition granted by the State of Washington.

DATED this 10th day of May, 2004.

Respectfully submitted,

PRESTON GATES & ELLIS LLP

By _____
Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Attorneys for Plaintiffs
On behalf of the ACLU of Washington

DAVIS WRIGHT TREMAINE LLP

By _____
Roger A. Leishman, WSBA # 19971
Jennifer K.T. Warner, WSBA # 32910
Attorneys for Plaintiffs
On behalf of the ACLU of Washington

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

By _____
Aaron H. Caplan, WSBA # 22525
Attorney for Plaintiffs
On behalf of the ACLU of Washington

STOKES LAWRENCE PS

By _____
Karolyn A. Hicks, WSBA # 30418
Attorney for Plaintiffs
On behalf of the ACLU of Washington

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022