Supreme Court No. 75934-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN, et al. Respondents,

v.

KING COUNTY, et al. Appellants,

CELIA CASTLE and BRENDA BAUER et al., Plaintiffs,

v.

STATE of WASHINGTON, Defendant.

CORRECTED BRIEF OF RESPONDENTS CASTLE, ET AL.

Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Lyle Tenpenny, WSBA #34883
Amit Ranade, WSBA #34878
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

Roger A. Leishman, WSBA # 19971
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

Aaron H. Caplan, WSBA # 22525
A.C.L.U. of Washington
705 2nd Avenue, Suite 300
Seattle, WA 98104-1799
(206) 624-2184

Karolyn A. Hicks, WSBA # 30418
Stokes Lawrence PS
800 5th Avenue, Suite 4000
Seattle, WA 98104-3179
(206) 626-6000

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Washington Cases

Federal Cases

Other State Cases

Washington State Statutes and Constitutional Provisions

Federal Statutes and Constitutional Provisions

Other State Statutes and Constitutional Provisions

Washington Court Rules

Other Sources

I. INTRODUCTION

Washington's marriage laws discriminate against same-sex couples and their children. This point is not in dispute. The only issue before this Court is whether the State can justify this discrimination consistent with the Washington Constitution. The State cannot.

Washington's constitution requires that state-conferred privileges, including the privileges of marriage, be made available to all Washington citizens on an equal basis. Washington's constitution provides protections against improper government interference in its citizen's private affairs and personal autonomy. Washington's constitution also requires that no Washington citizen be subject to different treatment on account of his or her sex. Consistent with these Constitutional requirements, the State cannot discriminate against same-sex couples and their children in its marriage laws.

Accordingly, the *Castle* respondents (eleven loving couples) and their children, respectfully request that this Court end the discrimination against them, stop the harm that flows from that discrimination, remove the obstacles to achieving stable family units, and affirm the Thurston and King County trial courts in declaring Washington's discriminatory marriage laws unconstitutional.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

Respondents assign no errors.

B. Issues Pertaining to Appellants' Assignments of Error.

1. The State's statutory and common law prevent Respondents and other same-sex couples from marrying their chosen partners and prevent the children of same-sex couples from growing up within family units stabilized by the institution of marriage. Should the opinions of the King County Superior Court and the Thurston County Superior Court be affirmed on the grounds that Washington laws unequally granting the right of marriage:

a. violate Art. I, § 12 of the Washington Constitution;

b. violate Plaintiffs' fundamental rights of privacy and autonomy guaranteed by the Washington Constitution, including Art. I, §§ 3, 7, 30 and 32; or,

c. constitute unlawful sex discrimination under the Washington Equal Rights Amendment, Art. XXXI, § 1?

2. If this Court affirms the trial court decisions below, should it decline to issue an advisory opinion on the question of civil unions?

III. COUNTER STATEMENT OF THE CASE

These consolidated appeals arise from two separate trial court decisions (*Andersen v. King County* and *Castle v. State*) declaring Washington's restriction of civil marriage to a man and a woman unconstitutional.

The *Castle* Respondents, totaling eleven couples, include a police officer, a firefighter, a photographer, a school teacher, a retired judge, a nurse, two Vietnam veterans and other citizens of Washington.[1] They hail from across the State of Washington, from Seattle to Spokane and from Friday Harbor to Hoquiam.[2] Despite their many unique characteristics, these Washington citizens share aspirations common among themselves and many Washington citizens – they want to marry the person they love. Their families, whether two young women raising grade-school children or two men on the brink of retirement, want the State of Washington to grant them the same marital rights and protections it affords to their heterosexual friends and neighbors.[3]

---

[1] CCP 30 at ¶ 2; 39-40 at ¶ 4; 45 at ¶ 2; 56 at ¶ 3; 64 at ¶ 4; 74-75 at ¶ 2; 77 at ¶ 2; 91at ¶ 3

[2] CCP 59 at ¶ 2; CCP 32 at ¶ 1; CCP 83-84 at ¶ 5; CCP 75-76 at ¶ 4.

[3] CCP 86-87 at ¶¶ 3, 5; CCP 68, 69-70 at ¶¶ 5, 7 and 8; CCP 75 at ¶ 3; CCP 65-66 at ¶ 7; CCP 37 at ¶ 5; CCP 58 at ¶ 8.

Many of the Respondents and their children have faced legal obstacles they would not have endured if the State allowed them to be civilly married. CCP 83-84 at ¶ 5 (partner of 32 years was unable to find the Durable Powers of Attorney during a medical emergency); CCP 68 at ¶ 5 (extended legal process to establish joint parental rights); CCP 60 at ¶ 6 (unlike heterosexual co-workers, respondent would be charged taxes on health insurance for his partner of nineteen years); CCP 79-80 at ¶¶ 10-13 (partners had to hire attorney to draft numerous legal documents to receive some of the legal benefits married couples enjoy automatically).

The *Castle* Respondents' primary purpose in seeking the legal rights associated with marriage is to strengthen their families. They want to make health care decisions for their life partners and children during medical emergencies.[4] They want to raise a family without having to adopt their own children.[5] 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.[6] They want their life partners to receive employment benefits that currently

[4] CCP 60 at ¶ 4; CCP 83-84 at ¶ 5; CCP 39-40 at ¶4

[5] CCP 68 at ¶ 5; CCP 86-87 at ¶ 5; CCP 46-47 at ¶ 8.

[6] CCP 79-80 at ¶¶ 10-13; CCP 56 at ¶ 5.

only opposite-sex couples automatically enjoy.[7] In short, Respondents want to be civilly married under the laws of the State of Washington.

IV. ARGUMENT

A. Civil marriage is a unique legal status defined by state law.

Marriage in Washington is the legal status between two equal spouses who share a presumptively lifelong mutual commitment to a family life of emotional and financial interdependence. Civil marriage is "properly characterized as a legal status" granted to two spouses who fall in love and choose to seek the State's recognition of their mutual commitment. *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). Specifically, RCW 26.04 and 26.09 prescribe the creation and termination of an individual's marital status. The State's statutory law determines the "legal duties and rights of the parties with respect to the marriage relationship ...." *Wash. Statewide Org. of Stepparents v. Smith*, 85 Wn.2d 564, 569, 536 P.2d 1202 (1975).

[7] CCP 91 at ¶ 4; CCP 64-66 at ¶¶ 6, 7.

The question before the Court is whether, under the Washington Constitution, the State must extend the status of marriage equally to adult couples regardless of their sex and sexual orientation.[8] The State's suggestion that this appeal involves "two distinct claims" – separating the "title of 'marriage'" from the "benefits and responsibilities that accompany the status of marriage" – is wrong. State's Br. at 1. Respondents' constitutional claims make no such distinction. *See* Complaint. Nor have Respondents suggested that marriage consists of a bundle of sticks, some of which the State may dole out to same-sex couples.

Moreover, Respondents' claims do not involve marriage as a social or religious institution. Many religions do use the word "marriage" to refer to rituals or sacraments for joining individuals in holy unions. These cases, however, pertain only to civil marriage, and have no effect on the doctrines and choices that religious faiths use to conduct marriage ceremonies or recognize "marriages." To the contrary, the State may not interfere with a religion's protected right to limit eligibility for its marriage sacraments on any basis, including such criteria as religious belief, sex, and divorce status. *See, e.g.*, Const. art. I, § 11.

[8] Although the *Castle* trial court suggested that Respondents asserted federal claims, Respondents pleaded state law claims only, and seek no independent relief under the United States Constitution. *See* Complaint.

As the *Andersen* Intervenor clergy suggest, the tenets of many sects limit religious matrimony to opposite-sex couples. Numerous other sects and congregations, however, bless religious marriages or unions between same-sex couples.[9] Regardless of the differences between different religions' doctrine, civil marriage is "governed by civil law rather than by ecclesiastical law." *Stepparents*, 85 Wn.2d at 569. 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 prerogative to believe that in the eyes of God, she and her estranged husband are ecclesiastically wedded as one").

The distinction between civil and religious marriage is particularly significant because the civil status of marriage (unlike religious marriage) is imbued with myriad legal benefits, responsibilities and protections. For 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

---

[9] CCP 92 at ¶ 6 (Quakers); CCP 78 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"); *see also* State's Br. at 39 ("private values" of individuals and their "religious associations "give the relationship its level of commitment and spiritual meaning").

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 trilemma 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. 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); CCP 65-66 at ¶ 7 (police officer frequently testifies and could be compelled to reveal intimate conversations with partner of fourteen years). 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).

Some legal rights that automatically extend to spouses may be simulated by unmarried couples through other means, but only

imperfectly. 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. CCP 79-80 at ¶¶ 10-13; CCP 56 at ¶ 5. Likewise, unmarried individuals may attempt to convey medical decision-making authority to their partners. CCP 56 at ¶ 5 (couple obtained formal documentation after being excluded from emergency room as non-family member). Even after incurring legal and other expenses drafting durable powers of attorneys or other documentation, however, Respondents continue to face anxiety and uncertainty regarding whether their efforts will be effective. CCP 80 at ¶ 14; CCP 83-84 at ¶ 5; CCP 87 at ¶ 6. Other legal consequences of marriage -- like the spousal testimonial privilege -- cannot be replicated through contract no matter how diligently the partners prepare.

As these examples illustrate, marriage is unique. There is no substitute for the legal protections afforded by the State to married couples and their children. No other legal status enjoys the special State recognition and imprimatur afforded to civil marriage, or fully embodies the deeply personal and intimate choice of choosing a marital partner. Respondents here are in love and committed to a life together. They seek the legal status that the State grants to those who make that commitment.

B. The State's Unequal Grant of the Right to Marry Violates Article I, section 12 of the Washington Constitution.

1. Our Privileges and Immunities Clause is interpreted independently of the Federal Equal Protection Clause.

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." Const. art. I, § 12. This court should approach the clause through two questions. First, should Const. art. I, § 12 be interpreted independently of the United States Constitution's equal protection guarantees? Second, is marriage a privilege that must be made available on the same terms equally to all Washington citizens? As demonstrated below, the answer to both questions is "yes".

Recently, this Court confirmed that Const. art. I, § 12 is interpreted independently of the United States Constitution's equal protection guarantees. *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn.2d 791, 806, 83 P.3d 419 (2004) (*Grant County II*). That conclusion applies to the protection of the right to equality in marriage pursuant to the test set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

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 plain language of the clause at issue to determine 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. Our Privileges and Immunities Clause provides cogent grounds for Respondents' argument. The text plainly prohibits laws "granting to **any citizens**, or class of citizens... privileges or immunities which upon the same terms shall not equally belong to all citizens..." (emphasis added). Washington currently grants to opposite-sex couples, 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. By the state constitution's plain terms, the State cannot grant privileges associated with such an

important status as marriage on a non-equal basis among Washington's citizens.

Factor two asks the Court to compare Const. art. I, § 12 to its federal counterparts. Again, by its plain language, the Washington clause is not identical to the Fourteenth Amendment of the United States Constitution. *See Grant County II*, 150 Wn.2d at 806 (text of Fourteenth Amendment "varies significantly" from text of Const. art. I, § 12). Moreover, the Privileges and Immunities Clause within Article IV, § 2 of the federal constitution addresses only interstate relations, mandating that states not withhold privileges and immunities from out-of-state citizens. *See Saenz v. Roe*, 526 U.S. 489, 501, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999). The Fourteenth Amendment Privileges and Immunities Clause requires states to respect the privileges and immunities bestowed by the federal government (i.e., rights of national citizenship). *Id.* at 503. None of these clauses are a direct textual analog to Const. art. I, § 12, which addresses privileges and immunities among Washington citizens.

The *Castle* trial court also correctly concluded that other provisions of the Washington Constitution, including the Washington Equal Rights Amendment are distinct from the United States Constitution and further highlight the variations between Const. art. I, § 12 and the United States Constitution. *Castle* Op. 15-19. The State suggests that the

trial court mistakenly considered the relationship between these provisions in determining that the second *Gunwall* factor favors an independent analysis. State's Br. at 12. But even when the state and federal provisions at issue are identical (which is not the case here), "other relevant provisions of the state constitution may require that the state constitution be interpreted differently." *Gunwall*, 106 Wn.2d at 61.

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. Const. art. I, § 12 was modeled after Article I, § 20 of the Oregon State Constitution. *Grant County II*, 150 Wn.2d at 807 & n. 11 (citing *State v. Smith*, 117 Wn.2d 263, 285, 814 P.2d 652 (1991) (Utter, J., concurring)); THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 501 n.20 (Beverly Paulik Rosenow ed., 1999). Thus, interpretations of the Oregon Privileges and Immunities Clause provide guidance to Washington Courts. *Grant County II*, 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).

Moreover, Oregon's clause was adopted in part to assure protection of minority rights. The primary proponent for an Oregon Bill of Rights, Delazon Smith, stated: "the history of the world teaches us that

the majority may become fractious in their spirit and trample upon the rights of the minority; that through the madness of party spirit they may infringe upon the rights of the individual citizen. Then, if the individual citizen is to be protected in this point in which he is endangered, there must be restrictions put into this constitution." *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, at 102 (Charles Henry Carey ed., 1926). In opposition, George H. Williams argued against a stand-alone Bill of Rights and stated instead that the ideals should be dispersed throughout the Constitution and that "...the general interests of the community will control the people and lead them to the proper course." *Id.* at 103. Smith's position prevailed, and Oregon (like Washington) adopted a stand-alone bill of rights to protect the rights of minorities. Indeed, the Washington framers chose to place its Declaration of Rights at the beginning of its Constitution. Thus, the framers of the Washington Constitution, by following the Oregon model, were concerned with both a minority group gaining an undue advantage **and** a minority group being subject to undue discrimination. *See Grant County II*, 150 Wn.2d at 808; *Smith*, 117 Wn.2d at 283 (Utter, J. concurring).

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, limitations on the government's ability to grant unequal privileges to certain individuals or groups dates from before the adoption of our Constitution. *Grant County II*, 150 Wn.2d at 809-810. Further, early case law interpreted the privileges and immunities clause independently from the federal provision. *Id* at 810.

Moreover, Washington has traditionally broadly granted its citizens the ability to marry and form intimate relationships. Washington's 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. As the *Castle* trial court recognized, Washington repealed its miscegenation statute prior to statehood and, thus, well before the United States Supreme Court declared such laws unconstitutional. *See* CCP 114-15; Wash. Terr. Laws of 1888 § 2380 *et. seq.*; Wash. Terr. Laws of 1866 p. 81; *Loving v. Virginia,* , 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) It also repealed its sodomy statute decades before the United States Supreme Court declared those laws unconstitutional. *See* Laws of 1975, ch. 260; *Lawrence v. Texas,* 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

The State suggests that this Court should ignore Washington's long tradition of equality, including the adoption of the Equal Rights Amendment, because this legacy includes developments occurring after the adoption of the Washington Constitution. State's Br. at 15-16. The preexisting state law inquiry, however, is not limited to laws enacted or repealed prior to 1889, but includes consideration of legislative and constitutional trends developing at statehood and continuing to the present day. *See, e.g., Gunwall*, 106 Wn.2d at 66 (examining range of statutory enactments from 1881 to the statute then presently existing to evaluate protection of telephonic and electronic communications); *State v. Johnson*, 75 Wn. App. 692, 702, 879 P.2d 984 (1994) (examining development of trespassing law).

There is little doubt that Washington's emphasis on individual rights and equality derives from territorial days. For example, our 1878 Constitution included a provision guaranteeing that "no person, on account of sex, shall be disqualified to enter upon and pursue any of the lawful business avocations or professions of life." 1878 Const. art. V, § 6. The Washington Territorial Legislature also granted women the right to vote decades before the 19th Amendment to the United States Constitution.

Laws of 1883, at 39.[10] These developments, including the adoption of the ERA, are part of a history in Washington of tolerance and equality spanning three centuries. Pre-existing state law favors an independent analysis under Const. art. I, § 12.

The State concedes that the fifth and sixth *Gunwall* factors support an independent analysis. State's Br. at 16. The fifth 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 sixth 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 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 (1858) (federal courts lack jurisdiction over dissolution actions). State laws are allowed to regulate marriage to the

[10] Although this statute was subsequently invalidated by the Territorial Supreme Court, it was reenacted shortly after the turn of the century. *See Harland v Territory*, 3 Wash. Terr. 131, 13 P. 453; Laws of 1909, ch. 18, § 1 (approved Nov. 1910).

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).

Finally, the six factors above are not exclusive. *Gunwall*, 106 Wn.2d at 61. The structure of Washington's Constitution, and its overall emphasis on equality and individual rights, also support an independent analysis where the issue is protection of the right to marry. Const. art. I, § 1 commences Washington's prominent Declaration of Rights by noting that governments "are established to protect and maintain individual rights." Individual liberties are addressed at the forefront of the constitution--rather than in a series of amendments—reflecting our Constitution's preeminent concern for individual rights. *See Richmond v. Thompson*, 130 Wn.2d 368, 381, 922 P.2d 1343 (1996) (protections in Washington's Declaration of Rights are afforded a "paramount and preferred place in our democratic system"). Our progressive origins similarly reflect a concern for individual well-being against potential governmental infringement. *See* Cornell Clayton, *Toward a Theory of the Washington Constitution*, 37 Gonz. L. Rev. 41, 67-68 (2001/2002). Const. art. I, § 32 embodies those concerns, reminding our courts that "a frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Similarly, Const. 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." As noted by Judge Hicks, the adoption of the Equal Rights Amendment, Const. art. XXXI, § 1, is further evidence of an overall commitment of the state constitution to equality under the law. Castle Op. at 18; *see also* Const. art. IX, § 1 (state has "paramount duty" to provide public education "without distinction or preference on account of race, color, caste, or sex").

The State contends that Washington's independent analysis under its Privileges and Immunities Clause should only apply when the claim involves a grant of a privilege to a minority, at the majority's expense. State's Br. at 10. The State's argument is contrary to the holdings of the *Grant County* decisions, not supported by the text of the Clause, and would deny those most in need of meaningful protection.

In deciding (correctly) that Const. art. I, § 12 must be interpreted independently of the 14th Amendment, this Court held in *Grant County II* that: "For the reasons dictated by the preceding *Gunwall* analysis, we hold that article I, section 12 of the Washington State Constitution requires an independent constitutional analysis from the equal protection clause of the United States Constitution." *Grant County II*, 150 Wn.2d at 811. As the *Castle* trial court correctly recognized, nothing in this holding supports the narrow interpretation urged by the State. *Castle* Op. at 12 ("There is

nothing in *Grant County* about our Constitution, Const. art. I, § 12, being limited to the relationship between majorities and minorities.").

To the contrary, this Court appeared to consider adopting the State's narrow position in *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) (*Grant County I*), only to reject the premise on reconsideration in *Grant County II*. The *Grant County I* court stated:

> Therefore, we hold that the *Gunwall* factors weigh in favor of a determination that article I, section 12 of the Washington State Constitution provides greater protection than the equal protection clause of the United States Constitution **when the threat is not of majoritarian tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than discrimination**.

Grant County I, 145 Wn.2d at 731 (emphasis added). As quoted above, in *Grant County II*, 150 Wn.2d at 809, this Court removed the emphasized excerpt from the *Grant County I* holding.

The State's interpretation would also undermine the fundamental purpose of the state constitution to protect individual rights. Under the State's view, majority rights would always receive heightened protection, but minority and individual rights would not (except to the limited degree protected by the federal Equal Protection clause). Moreover, the Clause's protection should not change depending on the most recent census count. Under the State's theory, the success of a claim involving gender

discrimination would depend on whether the latest census showed that men or women were a majority of the State population.

In sum, all six *Gunwall* factors, additional constitutional considerations, and the holdings in *Grant County* all support an independent interpretation of Const. art. I, § 12 in this case.

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

By its terms, Const. 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 II*, 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 opposite-sex couples to the exclusion of same-sex couples, the laws violate Const. 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*, 388 U.S. 1, 12, (1967).[11] Decades ago, the United States Supreme Court conferred fundamental-right status on the right to marry, *Id*, and the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (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.

Similarly, 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). 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

---

[11] 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 v. Safley*, 482 U.S. 78, 97, 107 S. Ct. 2254, 96 L.Ed.2d 64 (1987); *Zablocki v. Redhail*, 434 U.S. 375, 384, 98 S. Ct. 673, 54 L.Ed.2d 618 (1978); *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

one spouse a horse racing license if the other spouse was disqualified. *Id.* 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'Hartigan 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, 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, 23, 830 P.2d 395 (1992). Marriage is certainly a "privilege" granted by the State and subject to Const. art. I, § 12.

Appellants contend that the rights of marriage sought here are not fundamental because marriage traditionally involved two members of the opposite sex. *E.g.*, State's Br. at 18-21. The State relies on cases under the Fourteenth Amendment, thereby suggesting that a fundamental right under Washington's Privileges and Immunities Clause must be "deeply rooted in this Nation's history and tradition . . . ." State's Br. at 18 (quoting

Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)). Yet, while these authorities may provide a starting point to analyze fundamental rights under the Fourteenth Amendment, the guarantees of equality inherent in the Washington Constitution are not constrained by a rigid adherence to national history and tradition.

Early precedent interpreting Const. art. I, § 12, since reaffirmed by this Court in *Grant County II*, demonstrates that the catalog of fundamental rights protected by the clause extends beyond the narrow confines urged by the State. For example, in *State v. Vance*, 29 Wash. 435, 70 P. 34 (1902), the Washington Supreme Court recognized that Article I, Section 12 pertained to "those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship." *Vance*, 29 Wash. at 458. The Court analogized fundamental rights of state citizenship under Const. art. I, § 12 to rights of national citizenship under the federal privileges and immunities provisions. *Id.*; *see also Grant County I*, 145 Wn.2d at 745-46 (Sanders, J., dissenting). This is a broader ranger of rights than those available under the Fourteenth Amendment.[12]

---

[12] Federal courts have recognized that fundamental rights in the Article IV Privileges and Immunities Clause context are considered more expansively than fundamental rights under the Fourteenth Amendment. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978) (invalidating job preferences for state residents on basis of Article IV Privileges and Immunities Clause); *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948) (invalidating license fees for non-resident shrimp boat operators); *Hudson Cty Bldg & Constr. Trades Council v. City of Jersey City*, 960 F.

Moreover, "[t]he aim and purpose of the special privileges and immunities provision of Const. art. I, § 12, of the State Constitution . . . is to secure equality of treatment of all persons." *State ex rel. Bacich v. Huse*, 187 Wn. 75, 80, 59 P.2d 1101 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn. 2d 939, 603 P.2d 819 (1979). When principles of equality are at issue, courts should focus not solely upon history and tradition, but should also "**call into question** [existing] values and practices when they operate to burden disadvantaged minorities." *Watkins v. United States Army*, 875 F.2d 699, 718 (9th Cir. 1989) (Norris, J., concurring) (emphasis in original); *see also* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988).

This principle applies in particular force to the Washington Constitution. State constitutional law is designed to "adapt our law and libertarian tradition to changing civilization...." *Gunwall*, 106 Wn.2d at

---

Supp. 823, 831 (D.N.J. 1996) (recognizing that the "pursuit of a common calling" is a fundamental right for purposes of Privileges and Immunities Clause, but does not constitute a fundamental right in the Equal Protection Clause context). Thus, for example, the right to practice law is not a fundamental right for purposes of the due process clause of the Fourteenth Amendment. *Leis v. Flynt*, 439 U.S. 438, 442 n.5, 99 S. Ct. 698, 58 L. Ed. 2d 717 (1979). Yet, "the opportunity to practice law should be considered a 'fundamental right' [which] falls within the ambit of the Privileges and Immunities Clause." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985).

59 (quoting *The Role of a Bill of Rights in a Modern State Constitution,* 45 Wash. L. Rev. 453 (1970)). As this Court has observed:

> Constitutions are designed to endure through the years, and constitutional provisions should be interpreted to meet and cover changing conditions of social and economic life. Although the meaning or principles of a constitution remain fixed and unchanged from the time of its adoption, a constitution must be construed as if intended to stand for a great length of time, and it is progressive and not static. Accordingly, it should not receive too narrow or literal an interpretation, but rather the meaning given it should be applied in such a manner as to meet new or changed conditions as they arise.

State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 147, 247 P.2d 787 (1952) (quoting *State ex rel. Linn v. Superior Court*, 20 Wn.2d 138, 145, 146 P.2d 543 (1944)) (internal quotations omitted). The protections afforded by our Constitution are not dependent on the world as it existed more than a century ago.

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

A violation of Const. art. I, § 12 results when the State grants a "privilege to a class of citizens" to the exclusion of others. *Grant County II*, 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 (emphasis added). Thus, while opposite-sex couples over the age of 18 and otherwise capable may get married in Washington, same-sex couples over the age of 18 and otherwise capable may not.

Moreover, the State recognizes the marriages of opposite-sex couples that are solemnized in other jurisdictions. RCW 26.04.020(3). 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 Respondents in this action have been lawfully married in British Columbia. CCP 35-36 at ¶ 2; CCP 32-33 at ¶ 2; CCP 60 at ¶ 3; CCP 58 at ¶ 8. The State denies them the privileges and incidents of marriage – yet opposite-sex couples married in British Columbia are able to enjoy the benefits of Washington marriage fully.

c. No Reasonable Grounds Justify Discrimination in Marriage.

At a minimum, legislation that grants a privilege on an unequal basis cannot pass muster under Const. 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, 367, 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 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 "real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act." *Huse*, 187 Wash. at 84.

The State incorrectly attempts to equate the "reasonable grounds" standard with federal rational basis review. In *Grant County I*, Justice Madsen elaborated on the difference between the two standards:

> [E]arly cases indicate that the constitutional standard [of reasonable grounds review] **is not the same as the present equal protection 'rational basis' test, where any conceivable legislative reason for a classification will suffice.** Instead, the ... classification must rest on some real difference between those within and without the class that is relevant to the ... asserted purpose of the legislation.

Grant County I, 145 Wn.2d at 741 (Madsen, J., concurring & dissenting) (emphasis added); *see also Huse*, 187 Wash. at 84. Thus, the State's suggestion that the Washington Supreme Court has abandoned the "reasonable grounds" test or that it is the same as rational basis review is inaccurate.

i. Statutes based on prejudice are per se unreasonable.

As an initial matter, the evidence of discriminatory intent inherent in the adoption of Washington's Defense of Marriage Act ("DOMA") renders the law unconstitutional regardless of the justifications that Appellants offer. Legislation "based on prejudice or bias is not rational as a matter of law." *Miguel v. Guess*, 112 Wn. App. 536, 553, 51 P.3d 89 (2002) (citing, *inter alia*, *Romer v. Evans*, 517 U.S. 620, 633-34, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)). "Mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable...are not permissible bases" for disparate treatment. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). More specifically, "moral disapproval of a group cannot be a legitimate governmental interest..." *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring).

DOMA's legislative history is rife with evidence of its prejudicial underpinnings. The Act's prime sponsor distributed an article on the floor of the House of Representatives "saying gays and lesbians are not normal." DOMA: House Floor Debate ("Debate") (March 18, 1997) at 23 (Rep. Ed Murray in reference to comments by Rep. Bill Thompson). Another declared: "when [individuals] engage in homosexual activity they

confirm within themselves a disordered sexual inclination which is essentially self-indulgent." Debate at 44 (February 4, 1998) (Rep. Joyce Mulliken). One legislator told the Legislature's only openly gay member at the time "that we should take homosexuals and put them on a boat and ship them out of the country." Debate at 40 (February 4, 1998) (Rep. Ed Murray). Indeed, the legislation was not used "to discuss the institution of marriage, but instead to malign the lesbian and gay citizens of this state." *Id.*

The County quotes the testimony of three witnesses at the legislative committee hearing to suggest otherwise. *See* County Brief 35-37. But none of those witnesses were members of the Legislature. Moreover, in addition to the County's three witnesses, the record from those committee hearings includes other testimony that is even more tarnished than the comments from legislators quoted above. For example, one such witness warned that marriage equality "does not mean [Washington] will be 'slouching toward Gomorrah.' Instead, [it] will be in an all-out sprint." DOMA: Hearing on HB 1130 before House Law & Justice Committee, 55th Leg. (Hearings) at 50 (1997) (testimony of Anne Ball). Another labeled Washington's gay and lesbian citizens as an "abomination." *Id.* at 47 (testimony of Rabbi Daniel Lapin). Though milder in language, the County's witnesses evince similar prejudices by

referring to different-sex couples as normative. *See* County Brief at 35-37. While such "private biases may be outside the reach of the law...the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984). Based on this history alone, the Court should affirm both trial courts and declare DOMA unconstitutional and void.

ii. Appellants' proffered grounds are unreasonable.

Appellants offer two reasons for marriage discrimination: (1) that only different-sex couples are capable of bearing and properly raising children and (2) that this Court cannot redefine civil marriage. Both trial courts properly rejected these alleged justifications. *Castle* Op. at 35; *Andersen* Op. at 22.

Notably, although suggesting that granting marriage equality to same-sex couples could lead down a slippery slope to polygamous or consanguineous relationships, Appellants do not (and cannot) here rely upon the grounds that may justify prohibitions in that arena. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *on remand* 1996 WL 694235, at *20 ("Defendant's argument that legalized prostitution, incest and polygamy will occur if same-sex marriage is allowed disregards existing statutes and established precedent and the Supreme Court's acknowledgment of compelling reasons to prevent and prohibit marriage under circumstances

such as incest.") (internal citations omitted). Thus, for example, Appellants do not suggest that there are genealogical grounds here approximating the concerns raised in consanguineous relationships (County Br. 33-37) nor do they contend that same-sex marriages may foster an environment demeaning to women, as may be the case in polygamous relationships. *See Reynolds v. U. S.*, 98 U.S. 145, 166, 25 L. Ed. 244 (1878).

At issue here is the legal status between two equal spouses who freely choose to share a presumptively lifelong mutual commitment to a family life of emotional and financial interdependence. There are no reasonable grounds to deny the rights and privileges inherent in such relationships to same-sex couples.

A. Procreation and child-rearing are not germane to DOMA's distinctions.

Appellants primary argument is that marriage should be restricted to opposite-sex couples to promote reproduction and foster child development. Their argument discounts all same-sex couples who bear and raise children and all opposite-sex couples who marry but never intend to (or cannot) bear children. Appellants attempt to explain away this discrepancy by claiming that the connections between DOMA's limitations and the objectives of procreation and child-rearing need not be

"drawn with precision" to survive rational basis review. State's Br. at 35. But a mere assertion of "close enough" does not satisfy Washington's reasonable grounds review. *See Grant County I*, 145 Wn.2d at 741; *Huse*, 187 Wash. at 84.

Moreover, applying mere rational basis review, the Supreme Courts of two other states (Massachusetts and Vermont) rejected the same "grounds" Appellants offer here. The Massachusetts Supreme Court noted that "excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure." *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 964 (2003). The Vermont Supreme Court concluded that "[the objective] of promoting a commitment between married couples to promote the security of their children ... provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to **this goal** than their opposite-sex counterparts." *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864, 884 (Vt. 1999) (emphasis in original). These cases provide a compelling framework for analyzing state marriage discrimination laws.

In *Goodridge*, the Commonwealth defended Massachusetts' marriage discrimination laws on, among other things, procreation and child-rearing grounds. 798 N.E.2d at 962-63. The court squarely rejected

both grounds as appropriate bases for marriage discrimination. *Id.* at 961. It noted that "the 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." *Id.* at 962. In discarding the Commonwealth's argument, the court identified numerous state laws that "do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family." *Id.*

The court similarly rejected the argument that confining marriage to opposite-sex couples facilitates appropriate child development. 798 N.E.2d at 962-63. "Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy." *Id.* at 962. It recognized that "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." *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 63, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)); *see also* M. Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 Gonz. L. Rev. 91 (1991). The *Goodridge* court's survey of Massachusetts law revealed that it does not connect opposite-sex marriage and child-rearing in the way the Commonwealth suggested. 798 N.E.2d at 963.

The Vermont Supreme Court similarly concluded that same-sex couples cannot be denied the benefits of marriage. *Baker*, 744 A.2d 864. The plaintiffs in that case raised claims under Vermont's version of the Privileges and Immunities Clause. *Id.* at 870. The State responded that its marriage restriction existed to further procreation and promote child development. *Id.* at 881. The *Baker* court observed that other Vermont statutes conflicted with the notion that children are the exclusive purview of married, opposite-sex couples. *Id.* at 885 (citing 15A V.S.A. § 1-102, permitting same-sex couples to adopt children). The court recognized that "the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children." *Id.* at 882 (citing L. Ikemoto, THE IN/FERTILE, THE TOO FERTILE, AND THE DYSFERTILE, 47 Hastings L.J. 1007, 1056 & n. 170 (1996)). As in *Goodridge*, the *Baker* court found "extreme logical disjunction between the classification and the stated purposes of [Vermont's marriage discrimination] law – protecting children and 'furthering the link between procreation and child rearing.'" *Baker*, 744 A.2d at 884.

Like those of Massachusetts and Vermont, Washington's laws do not conflate marriage with procreation or child-rearing. The right to procreate does not hinge on marital status. RCW 26.26.101. The right to

marry does not depend on fertility. *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).[13] Washington law recognizes that procreation is not the exclusive purview of fertile, opposite-sex couples. *See* RCW 26.26.011(4) and .210 *et. seq* ; *In re Marriage of Litowitz;* 146 Wn.2d 514, 48 P.3d 261 (2002) (in vitro fertilization).

And as procreation is not a prerequisite for or limited to marriage, child rearing and children's rights are not limited to married opposite-sex couples. Adoption is not limited to married couples. RCW 26.33.140. Today, same-sex couples can (and do) bear their own children. *See* E. Shapiro & L. Schultz, SINGLE-SEX FAMILIES: THE IMPACT OF BIRTH INNOVATIONS UPON TRADITIONAL FAMILY NOTIONS, 24 J. Fam. L. 271, 281 (1985). Inheritance rights do not depend on the marital status of a child's parents. RCW 11.04.081. Unfit parents may lose custody of even their biological children. *See In re Custody of Stell*, 56 Wn. App. 356, 783 P.2d 615 (1989); *McDaniels v. Carlson*, 108 Wn.2d 299, 738 P.2d 254 (1987) (blocking paternity action of unfit biological father).[14] The State

---

[13] Additionally, married couples are not required to bear offspring. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (right of married couples to use contraception).

[14] Indeed, if it is in the best interests of the child, some courts have preferred same-sex couples over opposite-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);

expressly recognizes non-biological parental bonding. *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").

Further, our Court of Appeals recently held that non-biological lesbian mothers are entitled to full parental rights. *In re Parentage of L.B. (Carvin v. Britain)*, 121 Wn. App. 460, 89 P.3d 271 (2004) (parental rights established for former lesbian couple). In that case, a same-sex couple in a meretricious relationship had a baby together through the artificial insemination of one partner. *Id.* at 464. The non-genetic mother sought to establish parental rights to the child after the couple had separated. *Id.* The court held that, where the non-genetic mother had been a part of the child's life from the very beginning with the consent of the genetic mother and had a close, continuing parent-like relationship with the child, that non-genetic mother will be recognized as a legal mother under Washington law. *Id.* at 487-88; *cf. State ex rel. D.R.M. v. Wood*, 109 Wn. App. 182, 34 P.3d 887 (2001) (denying child support obligation against

---

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).

former partner of lesbian biological parent under former Uniform Parentage Act, but leaving open the question whether amended Act applies to same-sex couples under equal protection analysis).

Indeed, as both trial courts observed here, extending the status of marriage to same-sex couples will enhance, not inhibit, the opportunities for children to enjoy the benefits of stable two parent family units. *See also Goodridge*, 798 N.E.2d at 965 (allowing same-sex couples to marry "will not diminish the validity or dignity of opposite-sex marriage any more than [interracial marriage] devalues the marriage of a person who marries someone of her own race. *Id.* at 965. As noted by the 150,000 member American Psychological Association: "[P]arenting effectiveness and the adjustment, development and psychological well being of children [are] unrelated to parental sexual orientation." APA Res., Sexual Orientation and Marriage (July 28, 2004), *available at* http://ww.apa.org/releases/gaymarriage_reso.pdf; *see also* DEVELOPMENTS IN THE LAW—SEXUAL ORIENTATION AND THE LAW, 102 Harv. L. Rev. 1508, 1642-60 (1989). Indeed, for several of the Respondents, protecting their children is the most important reason for seeking to marry or to have their marriages recognized by the State. CCP 68 at ¶ 5; CCP 86-87 at ¶ 5; CCP 46-47 at ¶ 8).

Appellants' reliance on *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974), does not alter this legal landscape.[15] Thirty years ago in *Singer*, the Court of Appeals declared that "the institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." *Id.* at 264. "Not only is the rationale of [*Singer*] suspect, but it was handed down at a time, and under facts, where simply the status of being a homosexual was by that fact alone sufficient to be terminated as a public school teacher." *Castle* Op. at 3 (referencing *Gaylord v. Tacoma Sch. Dist. 10,* 88 Wn.2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977)); *but see Miguel*, 112 Wn. App. 536 (rejecting employment discrimination against gays and lesbians). Regardless of whether *Singer's* summary pronouncements regarding procreation and child-rearing were accurate 30 years ago, they cannot be reconciled with current Washington law. *Singer* does not provide reasonable grounds to discriminate under Const. art. I, § 12.[16]

---

[15] *Singer* also has no precedential value in considering Respondents' Privileges & Immunities claims. The only claims addressed in *Singer* fell under Washington's Equal Rights Amendment and the federal constitution. 11 Wn. App. at 248; *see also Castle* Op. at 8-9.

[16] Intervenors' attempt to buttress these legal arguments with various studies also fails. Not one of Intervenors' studies compares children raised by same-sex couples with children raised by opposite-sex couples. *See, e.g.*, Intervenors' Br. at 41. Instead, their studies rely on statistics from single-parent households and broken homes. *Id.* Judge Downing observed "that there are no scientifically valid studies tending to establish a negative impact on the adjustment of children raised by an intact same-sex couple as compared with those raised by an intact opposite-sex couple." *Andersen Op.*, at 21.

Appellants' other authorities fare no better. The federal equal protection analysis followed in *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), to the extent it even applies under Washington law, has since been superseded. *See Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring); *Romer*, 517 U.S. at 632. While, in the words of the *Baker* court, "abstract symmetry" may not have been required in 1971, the law today requires something more when the distinctions at issue single out a politically unpopular class.

Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973), does not involve an equality claim at all. The plaintiffs there asserted claims under the First Amendment's free exercise and association clauses and the Eighth Amendment's cruel and unusual punishment clause. *Id.* at 589. None of those issues are before this Court.

Dean v. Dist. of Columbia, 653 A.2d 307 (D.C. 1995), is comprised of three separate opinions, each with a different equal protection analysis. 653 A.2d at 333-36; 363-64. One judge concludes that a level of scrutiny greater than rational basis may be appropriate. *See Dean*, 653 A.2d at 336 (Ferren, J., concurring & dissenting). Another calls for rational basis review, partly relying on the now-overruled *Bowers v. Hardwick*. *See Dean*, 653 A.2d at 364 n. 4, 5 (Steadman, J.,

concurring). *Dean* provides little coherent guidance on whether a statute barring same-sex families from marriage is reasonably related to the goal of procreation.

Standhardt v. Superior Court, 206 Ariz. 276, 77 P.3d 451 (Ariz. App. 2003), fares no better with respect to a privileges and immunities analysis under the Washington Constitution. Arizona has specifically held that its Privileges and Immunities Clause provides the exact same protections as the federal Equal Protection Clause. *Empress Adult Video and Bookstore v. City of Tucson,* 204 Ariz. 50, 59 P.3d 814, 828 (2002). Recognizing this, *Standhardt* employed basic federal rational basis review. 77 P.3d at 464. As discussed in Section IV(B)(2)(c), *supra*, Washington requires more. Moreover, the Arizona court's application of the federal standard was erroneous. It never considered the background surrounding Arizona's marriage restriction and whether that history merited the more searching review announced by the U.S. Supreme Court in *Lawrence* and *Romer*. *See Standhardt*, 77 P.3d at 465.

In sum, there is no "real and substantial difference" between same-sex couples and opposite-sex couples with respect to procreation and children that bears "a natural, reasonable, and just relation to the subject-matter of the act." *Huse*, 187 Wash. at 84. Procreation and child-rearing

are not reasonable grounds upon which the State may exclude same-sex couples from marriage.

B. The "definition" of marriage does not justify discrimination.

The State contends that equality in marriage would change the meaning of the word, and that "[t]he constitution does not require words to change their meaning." State's Br. at 39 (citing 1968 legal dictionary). This argument also fails for two reasons. First, a tradition of discrimination is not a reasonable ground on which to continue it. Second, marriage is hardly the unchanging institution that Appellants suggest. Marriage, like our society, has evolved over time.

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. Fortunately, the Legislature and the courts of this state have acted to ensure equality under the law.

Historically, the legal definition of marriage also 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)).

Similarly, as the County acknowledges, in the past, "Washington law regarding marriage made some distinctions between men and women." County Br. at 6. According to the County, "these distinctions primarily related to the minimum age at which one could marry." County Br. at 6. But recent changes to our marriage laws have altered past gender stereotypes in many more significant ways.

Western society has not always shared today's concept of marriage as a partnership between equals. Marriages were often viewed as "property" transactions. *Stanard v. Bolin*, 88 Wn.2d 614, 620, 565 P.2d 94 (1977). 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 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, Ex. Sess. 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 1972, Washington enacted the ERA, which mandated equal treatment without regard to gender. *See* Const. art. XXXI, § 1. 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 this 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 this Court has noted, "[n]owhere in the common-law world – indeed in any modern society – is a woman regarded as 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, 52, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)). Thus, over the years the Legislature and the courts have replaced sexist stereotypes in marriage with concepts of equality. *In re Marriage of Mattson*, 107 Wn.2d 479, 484, 730 P.2d 668 (1986).

The *Andersen* Intervenors contend that "the institution of marriage brings order to heterosexual intercourse." Intervenors' Br. at 36. In the past, marriage indeed 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 matrimony" is "the avoiding of fornication"); Emily R. Brown, *Changing the Marital Rape Exception: I Am Chattal (?!); Hear Me Roar*, 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"). Indeed, the State previously 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. The State appropriately has stepped back from intrusion into most private decisions about how couples choose to organize their relationships.

As these examples demonstrate, notwithstanding traditional roles and stereotypes, an individual's fundamental right to marry is no longer limited on the basis of race, religion, sexual intimacy, parental status, or sex in Washington. Yet, even if the institution of marriage were frozen in time, the State may not shield itself from constitutional scrutiny on the grounds that it is merely perpetuating existing definitions that happen to be discriminatory. In other contexts, claimed historical definitions have not insulated discrimination from constitutional challenge. For example, the definition of the word "jury" has evolved over time. Originally, a jury was a panel of only men. *See, e.g., Harland v. Territory,* 3 Wash. Terr. 131, 13 P. 453 (1887) (the State may exclude women from juries because a jury by definition had always been composed of men). Today, juries are defined to include women. *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).

A history of exclusion cannot justify present discrimination. *Lawrence,* 539 U.S. 577-78 (citing *Bowers v. Hardwick,* 478 U.S. 186, 216, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (Stevens, J., dissenting)). Modern marriage is far more than a word. It is "the result of that complex experience called being in love." *Stanard,* 88 Wn.2d at 620. Reliance on

a dictionary definition -- and an inaccurate one, to boot -- is not a reasonable ground to deny equality in marriage.

3. The State's marriage laws' use of a suspect classification demands heightened scrutiny.

As demonstrated above, denying the privilege of marriage on an unequal basis demands at least reasonable grounds scrutiny under the Washington constitution. Because the inequality at issue rests on sexual orientation discrimination, heightened judicial scrutiny also applies. The State cannot justify its discrimination under heightened judicial scrutiny; it does not even try.

a. Other States including Oregon have applied heightened scrutiny to sexual orientation discrimination.

While Washington courts have not decided whether sexual orientation should be deemed a suspect classification under the Washington Privileges and Immunities clause, Oregon courts have so held under the model for Washington's clause -- 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).

In *Tanner*, the Oregon Court of Appeals court struck down a statute that provided insurance benefits to opposite-sex married couples but not to same-sex couples. *Tanner*, 971 P.2d at 445-48. The court first

determined that homosexuals are a "true class" because they have an "identity apart from the challenged law itself." *Id.* at 445. Further, sexual orientation is a suspect class because it is based on immutable characteristics that define the class as a "distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Id.* at 446. The Oregon court held there were no justifications for denying privileges or immunities to homosexuals because of their homosexuality. *Id.* at 447. Moreover, the law failed to pass constitutional muster, despite a facially neutral classification (only *married* couples were eligible for health benefits). *See id.* at 448 (noting that such reasoning misses the point because "homosexual couples may not marry [and thus] the benefits are not made available on equal terms.")

Nor, as Appellants assert, is Oregon alone in recognizing sexual orientation as a suspect class. California appellate courts have expressly held that sexual orientation classifications are suspect and require rigorous scrutiny for equal protection purposes. *See, e.g., Children's Hosp. & Med. Ctr. v. Belshe*, 97 Cal. App. 4th 740 (2002) (identifying race and sexual orientation classifications as examples of suspect classifications under the California Constitution); *Holmes v. Cal. Nat'l Guard*, 90 Cal. App. 4th 297 (2001) (affirming lower court decision that sexual orientation classifications are subject to heightened scrutiny). So have other courts.

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *on remand* 1996 WL 694235, at *19-*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).

Although Washington courts have not yet directly addressed whether sexual orientation is a suspect class under Const. art. I, § 12, they have examined sexual orientation discrimination with a careful eye. *See Miguel*, 112 Wn. App. at 552 n.3. In *Miguel*, the Court of Appeals 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." *Id.* at 554. Accordingly, the *Castle* trial court correctly concluded that, under Washington's privileges and immunities clause, "homosexuals in the context of state action . . . constitute[] a suspect class under the state constitution calling for a higher level of scrutiny than merely finding a rational basis to justify the action." *Castle* Op. at 26.

Like Washington's courts, the United States Supreme Court has yet to reach the question whether gays and lesbians constitute a suspect classification, but the federal trend is toward affording at least some form

of heightened review under the Fourteenth Amendment. *See, e.g. Lawrence*, 539 U.S. at 577-79; *Romer*, 517 at 633-34. Before *Lawrence*, many federal courts, relying on *Bowers*, 478 U.S. 186, reasoned that if states could legitimately criminalize sodomy then homosexuals cannot be considered a suspect class.[17] *See, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571-72 n.6, 573-74 (9th Cir. 1990).

In reversing *Bowers*, the *Lawrence* Court erased the foundation for decisions such as *High Tech Gays*. *Lawrence* underscored that laws against "homosexual conduct" are "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres" and rebuked the state for branding gay people unworthy. 539 U.S. at 575, 578 ("The State cannot demean their existence or control their destiny."). The *Lawrence* Court did not articulate a standard for courts to apply to sexual-orientation discrimination cases, but the Court recognized that gays and lesbians constitute a vulnerable minority entitled to specific constitutional protection.

---

[17] Several district courts issued, pre-*Lawrence*, cogent opinions explaining why, under established equal protection doctrine, sexual orientation should be accorded strict scrutiny. These decisions were reversed based in part on *Bowers*; in light of *Lawrence*, federal courts are likely to resurrect the reasoning of these courts, as should this Court. *See, e.g., Equality Found. of Greater Cincinnati v. Cincinnati*, 860 F. Supp. 417, 434-40 (S.D. Ohio 1994); *Jantz v. Muci*, 759 F. Supp. 1543, 1546-51 (D. Kan. 1991); *Ben-Shalom v. March*, 703 F. Supp. 1372, 1380 (E.D. Wis. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368-70 (N.D. Cal. 1987).

b. Sexual Orientation fits within the factors Washington have looked at in finding a suspect class.

That sexual orientation is a suspect classification is all the more evident when examining the factors traditionally employed to determine the existence of suspect classification. Classifications are suspect if they are drawn from a personal characteristic that (1) correlates to prejudice and a history of discrimination against a group; (2) is unrelated to one's ability to contribute to society but distinguishes in a manner that indicates one's membership in the disfavored group; and (3) correlates to insufficient political power to redress adverse treatment of the group legislatively. *See Hanson v. Hutt*, 83 Wn.2d 195, 199, 517 P.2d 599 (1974) (holding that sex-based classifications are inherently suspect and must be subject to strict judicial scrutiny) (quotations omitted, *superseded in part by* Wash. Const. art. 31, § 1; *see also Washington v. Schaaf*, 109 Wn.2d 1, 17-19, 743 P.2d 240 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Each of these factors support strict scrutiny here.

i. Lesbians and gay men have been the targets of past discrimination.

There is no dispute that lesbians and gay men have been the targets of past discrimination. *See* Intervenors' Br. at 29 n.13 (conceding the same). Like alienage and illegitimacy, actual and perceived

homosexuality has been the justification for centuries of stigma and exclusion. *See Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014, 105 S. Ct. 1373, 84 L. Ed. 2d 392 (1985) ("homosexuals have historically been the object of pernicious and sustained hostility") (Brennan, J., dissenting). Gay people have lost their children, their jobs, their freedom, and their lives solely because of adverse stereotyping and prejudice about their sexual orientation -- precisely the kind of social and political treatment that defines a suspect class. Discrimination remains evident in Washington to this day. *See generally Miguel*, 112 Wn. App. 536 (employment discrimination). It was apparent on the floor of our Legislature when the Defense of Marriage Act was enacted. *See* Section IV(B)(2)(c)(i), *supra*. The first element of the traditional test for heightened scrutiny is established.

ii. Sexual orientation is an irrelevant personal characteristic that is central to identity and not readily changed.

Intervenors' principal objection is their assertion that sexual orientation is "mutable," and they rely upon the Ninth Circuit's "finding" in *High Tech Gays* that sexual orientation is "behavioral" rather than innate and resistant to change. 895 F.2d at 573-74. Intervenors also contend that experts disagree about whether sexual orientation is readily

changeable through medical intervention or "therapy." Intervenors' Br. at 29-30. These arguments fail.

First, the key issue is not whether the distinguishing trait is changeable or concealable, but whether it is sufficiently unrelated "to a person's ability to perform or contribute to society" that disfavored treatment on that basis is "grossly unfair" and "invidious." *Watkins*, 875 F.2d at 724-25 (Norris, J., concurring); *Hanson*, 83 Wn.2d at 199 (question is whether distinguishing trait "bears no relation to ability to perform or contribute to society . . . [so] that the whole class is relegated to an inferior legal status"). The fact that individuals may be able to alter the appearance of traits correlated to their sex, race, or national origin, for example, does not make it constitutional for the government to discriminate on these grounds. "Immutability may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically." *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

Thus, while the Ninth Circuit held in *High Tech Gays* that sexual orientation is not immutable, the Ninth Circuit has since corrected that statement: "Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to

abandon them.... The American Psychological Association has condemned as unethical the attempted 'conversion' of gays and lesbians." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (allowing gay Mexican man to seek asylum based on having been persecuted for his social group membership).

iii. Lesbians and gay men have limited ability to obtain redress through legislative process.

Appellants suggest classifications burdening gay people do not deserve strict scrutiny because lesbians and gay men are not "politically powerless," noting the passage of a few laws forbidding discrimination, hate crimes and malicious harassment based on sexual orientation.

The existence of some laws addressing the most egregious mistreatment of gays and lesbians does not mean this minority group is able to obtain redress for unjust treatment through the majoritarian process. Several House and Senate bills have been introduced in the Legislature proposing to add the term "sexual orientation" to the text of the Washington Law Against Discrimination, RCW 49.60.010. *See, e.g.*, HB 2197, 56th Leg., Reg. Sess. (Wash. 1999), SB 5771, 57th Leg., Reg. Sess. (Wash. 2001), HB 1524, 57th Leg., Reg. Sess. (Wash. 2001). None of these bills was enacted. In fact, legislation has recently been introduced specifically to preclude sexual orientation discrimination from the protections of the WLAD. *See* HB 1809, 58th Leg., Reg. Sess. (Wash.

2003). The reasons to conclude that a disfavored minority may be unable to obtain redress via the Legislature remain, even if the group makes incremental advances legislatively.

In sum, all indicia of a suspect classification are present here, and heightened scrutiny should apply. The State does not and cannot justify its discrimination under heightened scrutiny.

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

As discussed above, Washington's Declaration of Rights commands the Court to make "frequent recurrence to fundamental principles" Const. art. I, § 32. Among the rights expressly identified in the Declaration of Rights is the right to privacy. Const. art. I, § 7 states that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Another is the right to due process. The Washington Constitution's Due Process Clause, Const. art. I, § 3, provides that "[n]o person shall be deprived of life, liberty or property, without due process 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 without interference by the State. This liberty interest encompasses the right to choose one's marital spouse.

1. The Washington Constitution Provides Greater Privacy Rights than the United States Constitution.

There is no language in the federal constitution that expressly protects privacy outside of the search-and-seizure context. *Cf. Bedford v. Sugarman,* 112 Wn.2d 500, 508, 772 P.2d 486 (1989) (discussing lack of express privacy provision in federal constitution). In contrast, the heading of Const. art. I, § 7 states: "Invasion of Private Affairs or Home Prohibited", and the body of that section identifies both a person's "home" and "private affairs" as protected in Washington against government interference. In addition, "art. I, § 32 has been cited as a reason for analyzing principles supporting a right to privacy...." *Seeley v. State,* 132 Wn.2d 776, 811, 940 P.2d 604 (1997) (citing *State v. Curran,* 116 Wn.2d 174, 188-89, 804 P.2d 558, 566 (1991) (Utter, J., concurring)). Thus, both textual language and constitutional distinctions, the first and second *Gunwall* factors, weigh in favor of more expansive privacy rights under the state constitution than provided in the federal constitution.[18]

[18] 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.

The third *Gunwall* factor, constitutional history, also supports more expansive privacy rights in Washington. 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 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)).[19] That decision must be given effect.

Factor four, preexisting law, further supports an emphasis on privacy and individual liberty. Washington's original constitution highlighted those rights, proclaiming "All persons are by nature free, and equally entitled to certain natural rights; among which are those of defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining happiness." 1878 Const. art. IV, § 3. Subsequent cases demonstrate that Washington courts construing Art. 1, § 7 of the 1889 Constitution have recognized its expansive scope, reaching personal decisions affecting autonomy. In a variety of contexts,

[19] One appellate 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 this 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."

Washington courts have recognized that, pursuant to Const. 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 Const. art. I, § 7 gives terminally ill adult a right of autonomy in medical decisions). This Court has repeatedly found that Const. art. I, § 7 is explicitly broader than that of the U.S. Constitution Fourth Amendment as it "clearly recognizes an individual's right to privacy with no express limitations" and places greater emphasis on privacy. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *see generally State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998); *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999).

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*.

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

Nonetheless, 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. The State is Infringing on Plaintiffs' Liberty, Privacy and Autonomy by Banning Same-Sex Marriage.

As noted by this Court, Const. art. 1, § 7 is analytically different from the Fourth Amendment in that it has two components – "private affairs" and "authority of law." *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997) (*Maxfield II*). As for "private affairs", the issue is not what privacy ordinary citizens actually experience, but rather what privacy they should expect:

> We have defined the scope of article I, section 7's right of privacy as focusing on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass . . . ." "The assessment of whether a cognizable privacy interest exists under [article I, section 7] is thus not merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold.

Maxfield II, 133 Wn.2d at 339 (internal citations omitted). This includes expectations of personal autonomy. *See Farmer*, 116 Wn.2d at 429. A citizen of this state should expect that the State will not interfere with the way he or she structures his or her life in its most intimate and defining ways, including the choice of a spouse.

Likewise, Art. 1, §3 protects Washington citizens' rights to privacy and autonomy by guaranteeing that "No person shall be deprived of life, liberty, or property, without due process of law." This Court has explicitly recognized that these due process protections extend to "matters relating to marriage, procreation, contraception, family relationships, and child-rearing and education." *Bedford,* 112 Wn.2d at 513. By banning same-sex marriage, the State is interfering with its citizens' cognizable privacy and liberty interests. *See generally Voris v. Human Rights Comm'n*, 41 Wn. App. 283, 290, 704 P.2d 632 (1985) ("Implicit within the right to privacy is the right to govern one's personal and intimate relationships..."); *O'Hartigan v. Department of Personnel,* 118 Wn.2d 111, 117, 821 P.2d 44 (1991)("The interest in autonomy is recognized as a fundamental right and is thus accorded the utmost constitutional protection. This right involves issues related to marriage, procreation, family relationships, child rearing and education.").

The State's marriage law interferes with the ability of Washington citizens to make their own decisions regarding personal and intimate relations, family decisions, child-rearing and marriage. Where such fundamental rights are implicated, 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), *supra*. To the contrary, the inescapable lesson to be learned from the history of privacy and substantive due process protections afforded to marriage at the state and federal level is that that the State's marital discrimination cannot stand.

The United States Supreme Court's decision in *Loving*, 388 U.S. 1, represents the cornerstone of privacy and due process protection of the right to marry. There, the Supreme Court 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 on interracial marriage:

> 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 3. 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. at 12 (emphasis added); *see also Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (prison inmates may not be denied the right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) (right to marry may not be denied to a father in default of his child support obligations).

The State attempts to distinguish *Loving* and its progeny on the grounds that Respondents are not different-sex couples whose relationships are enshrined in history. State's Br. at 27. Thus, for example, the State argues that "*Loving* involved a man and a woman who were capable of entering into marriage as defined by the history and traditions of the country." *Id.* Yet, the Lovings, who faced longstanding racial discrimination in marriage, were no more capable of entering into a "marriage as defined by the history and traditions of this country," than the Respondents are here. *See* Wadlington, *The* Loving *Case: Virginia's*

Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189 (1966).

The State also suggests that there was more tolerance of interracial relationships at the time of *Loving* than there is of same-sex relationships today. Even if this premise is accurate and relevant under our constitution, *Loving* addressed the constitutionality of miscegenation statutes nationwide. Long before *Loving*, state high courts such as this one began to strike down miscegenation statutes. *See Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948). This protection of individual rights by state high courts is a critical component of our federalist system. *See* Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is there a Crocodile in the Bathtub?*, 64 Wash. L. Rev. 19, 29-30 (1989).[20]

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 same-sex couples to marry. In

---

[20] In this same vein, the State's attempt to distinguish *Turner*, 482 U.S. 78, which struck down prohibitions on inmate marriages, also fails. The State suggests that at the time of *Turner* there was no history of prohibitions against inmate marriage. State's Br. at 28. In fact, the opposite is true. *See* 3 Michael B. Mushlin, *Rights of Prisoners*, § 15:8, at 30 (3d. Ed. 2003) (noting 1978 study revealing that only three states recognized rights to inmate marriage); Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U.L. Rev. 275, 277-280 (1985) (discussing historical rejection of right to inmate marriage).

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). 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; *see also Baehr v. Lewin*, 75 Haw. 530, 852 P.2d 44; *Brause*, 1998 WL 88743.

The State's argument that the Respondents are seeking "not privacy - but the requirement that the state make a public recognition of a private relationship" misapprehends the constitutional rights of liberty and autonomy. State's Br. at 48. Such rights are not limited to those activities cloistered behind closed doors. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mysteries of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Seeley*, 132 Wn. 2d at 821 (Sanders J., dissenting) (citing *Planned*

Parenthood v. Casey, 505 U.S. 833, 851, 112 S. Ct. 2791, 2807, 120 L. Ed. 2d 674 (1992)).

Thus, in Washington, the sphere of personal privacy and individual liberty encompasses diverse interests. In *Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000), the Court of Appeals decided the City of Seattle was trespassing on its citizens' privacy rights by conducting pre-employment urinalysis drug testing program at work. In *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990), this Court decided the State was trespassing on its citizens' privacy rights by searching garbage placed on the curb for collection without a warrant. In *State v. Koome*, 84 Wn.2d 901, 530 P.2d 260 (1975), this Court held that the State was trespassing on its citizens' rights of privacy and autonomy by requiring parental consent before obtaining an abortion.

The fact that the State's intrusion takes the form of a restriction does not make it any less of an intrusion into its citizens constitutional "right to be let alone." *See City of Seattle v. McConahy*, 86 Wn. App. 557, 564, 937 P.2d 1133 (1997) ("the Washington and federal constitutions prohibit legislation that unreasonably interferes with the individual's right to be let alone while engaged in innocent activity") (internal citation omitted). In banning same-sex marriage, the State is interfering with its citizens private affairs by regulating marital choice.

As between the State and its citizens, individuals should be entrusted to make choices about the shape of their lives and their relationships. *See Lawrence*, 539 U.S. at 578; Laurence H. Tribe, *Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004) (analyzing the *Lawrence* decision in the context of substantive due process and related constitutional notions of individual liberty); Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 Cato Sup. Ct. Rev. 21, 40 (2002-03) ("In the end, *Lawrence* is a very simple, indeed elegant, ruling. Justice Kennedy examined the conduct at issue to see if it was properly an aspect of liberty (as opposed to license), and then asked the government to justify its restriction, which it failed to do adequately"). A Washington citizen should expect that the State will not interfere with the way he or she structures his or her life in its most intimate ways, including the choice of a spouse. Washington citizens have liberty and privacy rights, which demand they be free from unreasonable interference into how and with whom they structure their relationships.

D. The Decisions Below Should also be Affirmed under Washington's Equal Rights Amendment.

Pursuant to RAP 10.1(g)(2), the *Castle* respondents adopt by reference the portions of the briefing by *Andersen* respondents pertaining to the Equal Rights Amendment.

E. This Court Should Strike Down Washington's Facially Unconstitutional Marriage Laws.

The State proposes that if this Court finds that Washington's marriage laws violate the Washington Constitution, "it should not grant the Plaintiffs the relief they seek until the Legislature has had the opportunity to cure any constitutional violation." State's Br. at 49. The State cites *Goodridge* and *Baker*, where the courts holding that same-sex couples have constitutional rights to marital benefits and protections stayed entry of judgment in order to allow the legislatures in those states to enact appropriate legislation. *See Goodridge*, 798 N.E.2d at 970; *Baker*, 744 A.2d at 889. In contrast with the high courts of Massachusetts and Vermont, however, there is no reason for this Court to stay entry of its judgment.

First, neither state's legislature had enacted a statutory DOMA. Instead, both *Goodridge* and *Baker* involved longstanding marriage license statutes under which clerk's offices had traditionally refused marriage licenses to same-sex couples. *See Goodridge*, 798 N.E.2d at 950;

Baker, 744 A.2d at 869. Thus, there was no express statutory barrier to same-sex marriage, and the legislatures in those states were given an opportunity to consider the issue. In this case, Respondents argue that a particular 1996 statute, RCW 26.04.010 *et seq.*, violates the Washington Constitution by specifically prohibiting same-sex marriages. "The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative." *City of Redmond v. Moore,* 151 Wn.2d 664, 669, 91 P.3d 875 (2003); *see also Amalgamated Transit Union Local 587 v. State,* 142 Wn.2d 183, 256, 11 P.3d 762 (2000) ("Invalidation of [an] unconstitutional enactment is the proper remedy."); *cf. Perez,* 32 Cal.2d 711 (1948) (first state supreme court to invalidate miscegenation statute as facially unconstitutional); *Loving,* 388 U.S. 1 (1967) (court did not withhold its judgment so that the legislature could create a second-tier category of "interracial marriage licenses" or "miscegenation licenses").

Second, the State's suggestion is based on its mischaracterization of this case as involving two "distinct claims" – equal access to the governmental "benefits and responsibilities that accompany the status of marriage," and equal access to the "title of 'marriage.'" State's Br. at 4. As discussed in Section IV(A), *supra*, Respondents' constitutional claims do not make any such distinction. Washington's marriage laws exclude

same-sex couples. There can be no legislative "cure" to the statute short of allowing Respondents to exercise their constitutional right to marry.

After the *Goodridge* decision, the Massachusetts Senate indeed considered a bill that would have made available to same-sex couples all of the rights, responsibilities, and legal incidents available to married opposite-sex couples, but would have denominated the legal relationship a "civil union" instead of a civil "marriage." The Supreme Judicial Court of Massachusetts rejected the Senate's proposed bill as violative of the equal protection and due process requirements of the Massachusetts Constitution. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004). The court noted that "[b]ecause the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status." *Id.* at 569. The court recognized that "group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid," since "separate is seldom, if ever, equal." *Id.* *See also* Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 Vt. L. Rev. 113 (Fall 2000) (acknowledging the benefits of civil unions legislation, but concluding that such separate-but-purportedly-equal "segregation in marriage is as inherently flawed as earlier examples long since rejected in the race and

sex contexts").[21] Similarly, the Washington Legislature may, of course, consider legislation consistent with this Court's decision. But nothing short of allowing same-sex couples to marry passes constitutional muster.

V. CONCLUSION

The trial courts correctly concluded that discrimination in marriage cannot stand under the Washington Constitution. Their decisions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 15th day of February, 2005.

PRESTON GATES & ELLIS LLP

By _____
Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Lyle Tenpenny, WSBA #34883
Amit Ranade, WSBA #34878
Attorneys for Respondents
Castle et al.

DAVIS WRIGHT TREMAINE LLP

By _____
Roger A. Leishman, WSBA # 19971
Attorneys for Respondents
Castle et al.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

By _____
Aaron H. Caplan, WSBA # 22525
Attorney for Respondents
Castle et al.

STOKES LAWRENCE PS

By _____
Karolyn A. Hicks, WSBA # 30418
Attorneys for Respondents
Castle et al.

[21] Contrary to the State's suggestion, State's Br. at 49-50, the Vermont Supreme Court never reached the question of whether a two-tiered statutory scheme would satisfy the equality requirements of the state constitution. As in Massachusetts, the effect of the court's decision was suspended and jurisdiction specifically retained by the court while the Legislature had the opportunity to "consider and enact legislation consistent with the constitutional mandate" described by the court. 170 Vt. at 229. Because the plaintiffs subsequently voluntarily dismissed their claims, however, the Vermont court never exercised its jurisdiction to evaluate any particular legislation.