No. 75934-1

SUPREME COURT OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN, et al.,

Respondents,

vs.

KING COUNTY,

Petitioner.

CELIA CASTLE and BRENDA BAUER, et al.,

Respondents,

vs.

STATE of WASHINGTON,

Petitioner.

RESPONDENTS' JOINT MOTION FOR RECONSIDERATION

Table of Contents

Table of Authorities

Page

Washington State Cases

Federal Cases

Washington State Statutes and Constitutional Provisions

Rules

Other Sources

I. INTRODUCTION

"To what purpose," asked Chief Justice John Marshall, "are powers limited ... if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803). This Court's lead opinion acknowledges a legislative wrong (unequal treatment of gay and lesbian families), but denies the wronged a judicial remedy. The Court articulates and applies a standard of judicial review so deferential to the legislative branch that it renders the rights of all Washingtonians subject to infringement at the whim of the barest legislative majority. Our constitution does not allow this.

Since territorial days, this Court has recognized that the judiciary must protect the rights of the minority or else the rights of all will be compromised:

> We shall have abandoned all the salutary checks which alone protect private right, and each man holds his life, liberty, and property at the mercy of the uncontrolled and hasty impulse of local majorities. To prevent such calamities was the judiciary created and made independent, and sworn to protect each individual's rights....

Thornton v. Territory, 3 Wash. Terr. 482, 494-95, 17 P. 896 (1888).

The Court's lead opinion cannot be reconciled with our constitutional history and precedent protecting individual rights.

Respondents respectfully request that the Court reconsider its ruling because it is inconsistent with the standard for rational basis review consistently followed by this Court in construing Article I, Section 12 of the Washington Constitution and inconsistent with the mandate of Washington's Equal Rights Amendment.

II. IDENTITY OF MOVING PARTIES

Respondents are 38 Washington lesbian and gay citizens, who comprise 19 committed couples and who seek civil marriage licenses in order to nurture and protect their families.

III. RELIEF REQUESTED

Pursuant to RAP 12.4, Respondents respectfully request the Court to reconsider its July 26, 2006 decision to reverse the rulings of the King County Superior Court and the Thurston County Superior Court.

IV. STATEMENT OF RELEVANT FACTS

The factual background is set forth in the Briefs of Respondents.

V. GROUNDS FOR RELIEF AND ARGUMENT

A. DOMA Does Not Survive Constitutional Scrutiny under This Court's Standard for Rational Basis Review.

Article I, Section 12 of the Washington Constitution forbids the State from "granting to any citizen [or] class of citizens ... privileges or immunities which upon the same terms shall not equally belong to all

citizens." In its decision, the Court concluded that neither a fundamental right nor suspect class was at issue and applied rational basis review to the marriage limitation in Washington's so-called Defense of Marriage Act ("DOMA"), Laws of 1998, ch. 1, § 1. Under this Court's well-established precedent, a statute limiting people's rights does not satisfy rational basis review unless the classification bears a "rational relationship to the proper purpose of the legislation." *DeYoung, v. Providence Med. Ctr.,* 136 Wn.2d 136, 144, 960 P.2d 919 (1988); *accord Willoughby v. Dep't of Labor & Indus.,* 147 Wn.2d 725, 740, 57 P.3d 611 (2002). And while the Court grants legislative classifications some deference under rational basis review, the standard is not a rubber stamp:

> As relaxed and tolerant as the rational basis standard is, ... the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.

DeYoung, 136 Wn.2d at 144. Respondents respectfully submit that the Court's lead opinion granted too much deference to the Legislature and misapplied the rational basis standard of review.

1. DOMA Creates a Classification Based on Status that Distinguishes between Opposite-Sex Couples and Same-Sex Couples.

Rational basis review under Article I, Section 12 starts by identifying the statutory classification at issue. *See, e.g. Conklin v.*

Shinpoch, 107 Wn.2d 410, 418, 730 P.3d 643 (1986). In this case, the express classification is between couples consisting of one man and one woman and couples consisting of two people of the same sex. DOMA provides that the former may marry; the latter may not. RCW 26.04.010 and .020. *See Andersen v. King County,* 138 P.3d 967, 983 (2006) (legislative classification made in DOMA is one "*limiting* marriage to opposite-sex couples") (emphasis added). As the lead opinion recognizes, this classification discriminates against lesbian and gay couples on the basis of their sexual orientation. *Andersen,* 138 P.3d at 973 (Madsen, J.) ("the article I, section 12 issue is whether plaintiffs are discriminated against as members of a minority class"); *Id.* at 981 (concluding that sexual orientation is not a suspect class); *Id.* (concluding that anti-gay animus was not the only motivation behind DOMA); *Id.* at 982 (marriage is limited to heterosexual couples).

In this regard, DOMA's classification is similar to other legislative status-based restrictions on marriage: age, consanguinity, and marital status. *See* RCW 26.04.010-.020. None of these other classifications advance the objective on which this Court focused in its rational basis analysis in this case: procreation (or, more narrowly, the presumed ability to procreate without third party assistance) and child-rearing. *See Andersen*, 138 P.3d at 982-83, 985. Minors, the closely related, and

polygamists may procreate through heterosexual intercourse and raise children. Viewing these marriage limitations together indicates that procreation and child-rearing by biological parents does not justify limitations on who may marry and who may not. *See Hallauer v. Spectrum Prop. Inc.,* 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (where statutes relate to the same subject matter, they must be "construed together"). While protection of underage individuals because of their incapacity to make decisions, protection of existing spouses from potential harm that may arise in plural marriages, and the protection of children from health issues resulting from procreation by parents too closely related to one another may be valid objectives, the Court found no similar protective purpose with respect to DOMA's classification. Some other legitimate justification for the legislatively-imposed marriage restriction must be found in order for the distinction to pass constitutional muster. But as the Court recognized, none of DOMA's other purported justifications are legitimate. *Andersen*, 138 P.3d at 981.

2. In Upholding DOMA, This Court Relied Upon A Speculative Rationale That Is Not A Legitimate Government Purpose.

Under Article I, Section 12, the court must examine whether limiting marriage to exclude same-sex couples serves a legitimate

purpose.[1] *DeYoung,* 136 Wn.2d at 144; *see also Willoughby,* 147 Wn.2d at 739; *Johnson v. Tradewell Stores, Inc.,* 95 Wn.2d 739, 744, 630 P.2d 441 (1981) ("[R]easonable grounds must exist for making a distinction between those within and those without the class."). The Court appropriately recognized that animus and tradition cannot provide a legitimate purpose for the DOMA classification. *Andersen*, 138 P.3d at 981; *see also Romer v. Evans*, 517 U.S. 620, 634-35, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); *Bowers v. Hardwick,* 478 U.S. 186, 199, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (Blackmun, J., dissenting) ("blind imitation of the past" is insufficient basis for legal rule).

Rather than rely on DOMA's improper purposes, the lead opinion relies on two stated purposes related to the well-being of children.[2] DOMA's classification, however, does not promote the well-being of all the state's children because it does not promote the well-being of children

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[1] The dissent's characterization of this legislative classification as ***excluding*** same-sex couples from marriage, rather than limiting marriage to opposite-sex couples, emphasizes the discriminatory impact of DOMA, but does not alter the nature of the classification itself. *Cf. Andersen*, 138 P.3d at 973 (Madsen, J.) ("[T]he article I, section 12 issue is whether plaintiffs are discriminated against as members of a minority class.").

[2] DOMA's purported purpose was to promote "raising children in a healthy environment" where they "thrive." *Andersen*, 138 P.3d at 984, 983. The second purported purpose was "encouraging families with a mother and father biologically related to both." *Id.* at 985; *see also id.* at 983 ("Encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.").

of same-sex couples. Thus, the question is whether the purpose to promote the well-being of **some** of the state's children, but not others, is a legitimate government purpose. In this light, the answer is no.

This interest is not a proper purpose because it is incompatible with the State's fundamental value of equal respect for **all** families, and, especially, **all** parent-child relationships – regardless of the sex of the parent, and regardless of whether the parent-child relationship exists due to sexual intercourse, medically assisted reproduction, de facto parentage, or formal adoption. *See generally* Ch. 26.26 RCW; *see also In re Parentage of L.B.,* 155 Wn.2d 679, 122 P.3d 161 (2005); *Murray v. Murray,* 28 Wn. App. 187, 190, 622 P.2d 1288 n.4 (1981) (attribute of "mothering" cannot "be considered an attribute confined to the female sex"); *City of Richland v. Michel,* 89 Wn. App. 764, 950 P.2d 10 (1998) (laws that discriminate between children of married and unmarried parents are subject to heightened scrutiny). The Legislature cannot rationally enact a law that prefers some of Washington's children over others. As with discrimination against Washington's gay and lesbian couples, judicial deference does not extend so far.[3]

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[3] Similarly, the Constitution would not permit a governmental purpose of promoting the well-being of children by limiting marriage to persons who the Legislature speculated would make better parents. For example, this Court would not uphold a legislative marriage restriction designed to

Like the notion that the State may privilege opposite-sex couples because that has been done historically, a preference for opposite-sex couples because they are opposite-sex couples is merely a restatement of the discrimination wrought by the statute, not a justification for it. The United States Supreme Court has observed that a state's purpose for distinguishing among persons not only must be "legitimate," but also must be "independent" of the classification itself. *Romer*, 517 U.S. at 633. According to the Court, "By requiring that the classification bear a rational relationship to an ***independent*** and legitimate legislative end, we ensure classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* (emphasis added); *see also Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 446, 450, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). A legislative classification that merely endorses one family configuration over all others is an improper "classification undertaken for its own sake" and without any independent basis. *Romer,* 517 U.S. at 635.

In short, legislation that creates a distinction between two classes of people must have some proper governmental purpose. Favoring one

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"promote and encourage the marriage of normal young people," as formerly espoused by the eugenics movement. And this Court would not defer to legislative judgments that the disabled should not marry because of speculative difficulties they might face as parents, though disability is not a suspect class.

type of family over another, or one type of parent over another, is not a legitimate purpose. Indeed, Washington's laws on parentage and parenting do not discriminate among fit parents. Washington's laws on marriage should not do so either.

3. DOMA's Classification Limiting Marriage To Opposite-sex Couples Is Not Rationally Related To The State's Purported Purpose.

In addition, the classification at issue also must bear a rational relationship to the legislation's identified legitimate purpose. *DeYoung*, 136 Wn.2d at 144 (citing *Griffin v. Eller*, 130 Wn.2d 58, 65, 922 P.2d 788 (1996)). As this Court has explained: "the relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational." *Id.* at 149. Based on this Court's analysis in *DeYoung*, and in contrast to this Court's analysis in *Foley v. Dep't of Fisheries*, 119 Wn.2d 783, 837 P.2d 14 (1992), the Legislature's decision to limit marriage to opposite-sex couples to further the asserted goals of child development and procreation is "so attenuated as to render the distinction arbitrary or irrational."

a. There is no rational relationship between DOMA's limitation on marriage and the promotion of the well-being of children.

The Court's analysis of the relationship between the classification limiting marriage to opposite-sex couples and the promotion of the well-

being of children rests on unsupported speculation, a misreading of the facts, and a misreading of the legislative record. The circumstances in *DeYoung* are instructive. There, this Court recognized that both the classification (creating a class of citizens who could not bring certain medical malpractice claims) and the purpose of the legislation (avoiding a perceived medical malpractice crisis) were proper. The Court evaluated the number of persons affected by the classification and determined that the number was so small that excluding those persons from asserting medical malpractice claims could not possibly have any influence on the medical malpractice insurance industry. *DeYoung*, 136 Wn.2d at 149. The classification therefore was deemed too attenuated from the claimed legislative purpose to survive scrutiny. Moreover, the Court observed that the Legislature's authority to address a problem "one step at a time" did not alter that conclusion. *Id.*

The situation here is no different. First, the Legislature's myriad of other statutes relating to the well-being of children demonstrates that the Legislature generally does not identify raising children in the home of their two biological parents as a legitimate legislative goal. Indeed, in **no** other statute affecting child-rearing does the Legislature promote raising children in the home of their two biological parents. The Legislature allows parents with children to divorce. RCW 26.09.002 (best interest of

child governs dissolution matters). The Legislature allows adoption by persons who are not biological parents and allows persons to have children using genetic material other than their own. RCW 26.33.140. The Legislature allows persons to use techniques to bear children outside of marriage. RCW 26.26.705 - .740. The Legislature does **not** allow children's biological parents to marry if those parents are underage, closely related, or already married to other people. RCW 26.04.020. In other words, there is no relationship between the State's other classifications and the notion that children would be best raised in the home of their two biological parents.

Second, statistically, the relationship between the classification and accomplishing the purported goal is as attenuated as in *DeYoung*. There are about 1.5 million children under the age of 18 in Washington. Ann E. Casey Foundation, "Kids Count State-Level Data Online," August 29, 2006 (available at: www.aecf.org/kidscount). Of those, approximately 7,500 live in same-sex households. R. Bradley Sears and Prof. William B. Rubenstein, "Same-Sex Couples and Same-Sex Couples Raising Children in Washington Data From Census 2000," The Williams Project on Sexual Orientation Law and Public Policy UCLA School of Law, January 2005.[4]

[4]Available at: www.law.ucla.edu/williamsinstitute/publications/WashingtonStateReport.pdf

Thus, the number of children impacted by the classification is about 0.05 percent of the total child population. In *DeYoung* this Court found that a classification impacting only one percent of medical malpractice claims in Washington was too attenuated to serve the Legislature's otherwise legitimate purpose. Here, as well, excluding 7,500 children from the benefits of living in a married couple household cannot possibly impact the number of Washington's children being raised in a household with their two biological parents in a meaningful way.

The Court's lead opinion, at footnote 13, distinguishes *DeYoung* based on the claimed differences between the record in that case and the present case. But the statistical similarities of the impact of the proffered classification on the governmental purpose are exactly the same in both cases. Moreover, the lead opinion cites research from Jeff Kemp's legislative testimony, which does not actually support his conclusion. 138 P.3d at 983, 1005. The research did not compare the well-being of children raised by same-sex couples with children raised by opposite-sex couples. The research instead focused on children raised in **two-parent** households versus **single-parent** households and, in one case, included a comparison of two biological parent households with single and step-parent households. The record here does not support the relationship between the classification and the purpose. If the point of the Court's

distinction from *DeYoung* is the lack of a record presented by DOMA's opponents, that distinction would be a wholly unprecedented conclusion. Rational basis analysis has never rested on the mere quantity of "evidence" placed in the legislative record by opponents and proponents of a proposed piece of legislation.

b. DOMA's classification does not further the purpose of encouraging procreation.

This same analysis applies to the other purported legitimate purpose: encouraging procreation by opposite-sex couples within legal marriage. There is no other statutory scheme that creates incentives for procreation by withholding civil marriage licenses. The Legislature allows procreation outside of male-female sexual relations. RCW 26.26.705-.740 (assisted procreation). Statistically, it is difficult even to see the relationship between the classification and the purposed legitimate purpose. Is the Court saying that by denying gay and lesbian people access to marriage, the two percent of the Washington population that self-identifies as gay or lesbian will be encouraged to marry someone of the opposite-sex , engage in heterosexual relations, and thereby procreate naturally? That proposition is so highly speculative and unsupported by anything in the record that it cannot be sustained. Denying marriage rights to same-sex couples simply does not further the goal of encouraging

procreation.

Indeed, the same-sex couple exclusion is no more rationally related to the stated purpose than an exclusion barring people with red hair from marrying each other would be to a legislative goal of encouraging more blond or brunette-haired people to marry and have children. Barring red-haired people from marrying cannot have the effect of encouraging more blond or brunette couples to get married, nor to have children. Likewise, barring same-sex couples from marriage has no rational connection to the State's purported goal – it does nothing to encourage heterosexual couples to marry, or to procreate, or to raise biological rather than adoptive children, or to remain married once they have children.

c. Limiting the benefits of a societal good – here, the benefits of marriage – should require a stronger rational relationship than limiting access to a scarce societal asset.

Finally, the lead opinion suggests that DOMA's classification is rational because some over- or under-inclusiveness is permitted, and that the Legislature is free to approach some problems piecemeal. 138 P.3d at 980. However, the authorities cited on this point all involve statutes where the purpose of the classification is to regulate use of a scarce resource. *See Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (affirmed classifications for entry into Kentucky's involuntary

commitment program for mental illness and retardation); *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) (affirmed grant allocation system in Maryland's welfare statute); *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 83 P.3d 999 (2004) (affirmed state disability services eligibility criteria); *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 948 P.2d 1264 (1997) (affirmed attorney fee provision to encourage insurers to pay meritorious claims rather than force litigation in the courts). As Justice Madsen has observed, although this rule applies in some contexts, it "has important limits":

> Were the principle to apply as broadly as it is stated here, no under inclusive legislation would ever violate equal protection; every such enactment could be upheld as a piecemeal solution. It is the court's role to examine the basis justifying such distinctions among classes of individuals. The court may well find that, as with the current legislation, the relationship between the classification and its goal is 'so attenuated as to render the distinction arbitrary or irrational.'

State v. Shawn P., 122 Wn.2d 553, 571, 859 P.2d 1220 (1993) (Madsen, J., dissenting). DOMA does not involve allocation of a scarce resource – marriage licenses are available in an unlimited supply. This distinguishes DOMA's classification from classifications that allocate scarce resources, where classifications provide incentives for certain behavior.

This Court's decision in *Foley v. Department of Fisheries*, 119 Wn.2d 783, 788, 837 P.2d 14 (1992), is instructive on classifications

related to scarce resources. There, the Court evaluated the legality of a classification that limited the number of persons who could commercially harvest sea urchins under the rational relationship test. In that case, the legislative purpose – protecting the sea urchin population – required by its nature a classification that limited rights. Sea urchins are a limited resource and to preserve that resource a limitation was enacted.

But, as noted above, marriage licenses are not a limited resource. The well-being of children is not a zero-sum game where encouraging the well-being of some necessarily harms others. Procreation likewise is not a zero-sum game. Therefore, the purpose of promoting the well-being of children and encouraging procreation is not advanced by creating a classification that limits a right like the purpose of preserving the sea urchin population is. As a matter of common sense, in the context of an unlimited good such as marriage, the promotion of procreation and child rearing would be advanced by allowing **more** couples to marry – not less. A classification that limits the access of Washingtonians and their children to an unlimited good should have a harder time meeting even the rational relationship test than a classification that restricts a limited resource.

Finally, because this case concerns limitations that negatively impact individual rights rather than regulating access to economic resources, this Court must remember its role as the government branch of

last resort to implement the state constitutional declaration that governments "are established to protect and maintain individual rights." Const. art. I §1. Less deference should be afforded statutes affecting personal civil liberties than economic statutes. *Conklin*, 107 Wn.2d at 417 (citing *Yakima County Deputy Sheriff's Ass'n v. Bd. of Comm's*, 92 Wn.2d 831, 844, 601 P.2d 936 (1979) (Utter, J., concurring)). Marriage is a civil liberty. Individuals who marry enjoy a tangible good, and because of that, their children, if they have them, also benefit. Indeed, as the Court acknowledges, deprivation of access to marriage does a direct and real harm to these families. 138 Wn.2d at 985 ("[M]any day-to-day decisions that are routine for married couples are more complex, more agonizing, and more costly for same-sex couples"). Thus, the Court should take special care in applying rational relationship review to laws limiting marriage.

Here, as in *DeYoung*, there is real harm to those excluded from marriage benefits by the State's classification. That harm cannot be rationally justified where all other legislative schemes related to the well-being of children and procreation are not served and are actually undermined by the purpose claimed to be served by DOMA's marriage limitation. That harm cannot be rationally justified where the number of persons impacted by the classification is too small to make any difference

in addressing the purposes claimed to be served by the same-sex marriage ban. Thus, the relationship between the state's classification and purpose is "so attenuated as to render the distinction arbitrary or irrational." *DeYoung*, 136 wn.2d at 149.

B. The Right Guaranteed by the Equal Rights Amendment is a Right Belonging to the Individual.

The Equal Rights Amendment forbids discrimination on account of sex. *Guard v. Jackson*, 132 Wn.2d 660, 664, 940 P.2d 642 (1997). This sweeping prohibition, without counterpart in the nation, embodies an individual's right to be free from discrimination on the basis of gender. *Id.* at 663.[5] For the first time, in this case, the Court has characterized the right to be treated equally without regard to sex as a right belonging to groups (or to couples) – i.e., because women and men are treated the same, no right under the ERA is violated. This analysis misapprehends the individual nature of the right at stake.

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[5] The concurrence correctly observes that "[t]he ERA plainly prohibits legislation that favors one sex at the expense of the other or that discriminates against one sex to the advantage of the other." 138 Wn.2d at [51] (Johnson, J., conurring). The ERA does plainly prohibit such unequal treatment. However, to the extent the concurrence can be read to suggest that the ERA is limited to circumstances where the legislation must work both an advantage to one sex and a disadvantage to the other, it would be not only wrong but contrary to thirty years of ERA jurisprudence. Not even the lesser protection of the federal equal protection clause depends upon such a "zero-sum" analysis. *See, e.g. U. S. v. Virginia,* 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed.2d 735 (1996).

As this Court has observed in other cases, the right to marry the person of one's choosing is an individual right. *See, e.g., City of Bremerton v. Widell,* 146 Wn.2d 561, 580, 51 P.3d 733 (2002) (anti-miscegenation laws violated the constitutional rights of individuals because they "hindered their ability to marry the person *of their choosing*.") (emphasis added). The State cannot deprive an individual of a constitutional right by imposing that deprivation equally, as the United States Supreme Court has repeatedly made clear.

> We reject as well the view that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson,* 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 256 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

Powers v. Ohio, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). This principle applies with equal force to gender discrimination. *See J.E.B. v. Alabama,* 511 U.S. 127, 140-41, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (individual right to be free from gender discrimination in jury selection).

> The neutral phrasing of the Equal Protection Clause, extending its guarantee to "any person," reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual ... class."

J.E.B., 511 U.S. at 152-153 (Kennedy, J., concurring) (internal citations omitted).

Likewise, Washington's ERA protects the rights of individuals, not groups. *Darrin v. Gould,* 85 Wn.2d 859, 874-876, 540 P.2d 882 (1975) (individual girl has right to play football regardless of generalized characteristics of the sexes). In particular, the ERA guarantees that the right an individual has to marry the person of her or his choosing may not be "denied or abridged on account of sex." Const. art. XXXI, § 1.

This point is illustrated by an example. A law that would require courts to place male children with their fathers in disputed divorce cases, and likewise require placement of female children with their mothers, plainly violates each parent's individual right to be free of discrimination based on sex. Even if both sexes, as groups, are treated the same, the ERA would prohibit this restriction on each individual parent's fundamental right to the custody and control of his or her children.

DOMA's prohibition against marrying a person of the same sex is

no different from this hypothetical restriction. A woman, merely by virtue of her sex, is denied the right to marry the person of her choosing under DOMA if that person happens to be a woman; a woman, merely by virtue of her sex, is denied the right to post-divorce custody of her child under the hypothetical law if that child happens to be a boy. It does not matter whether other women may in fact retain custody of their daughters, or that other women may in fact marry men. Nor is it relevant that men may not retain custody of their daughters, or that DOMA prohibits a man from marrying another man. The mother of the son suffers discrimination on account of sex, and the woman who wishes to marry her female partner suffers discrimination on account of sex, and nothing – not even a compelling state interest – can justify that discrimination. *See, e.g., Guard,* 132 Wn.2d at 664 (the ERA replaces federal equal protection analysis with this single criterion, mirrored in the amendment's language: "has equality been denied or abridged on account of sex?"). As a consequence of the Court's holding in this case, individuals are denied the equality guaranteed them by the ERA.

VI. CONCLUSION

Four years after casting the deciding vote in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), which upheld the constitutionality of Georgia's sodomy laws, Supreme Court Justice Lewis

Powell acknowledged: "I think I probably made a mistake in that one."[6] The Supreme Court later agreed, holding in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), that sodomy laws were discriminatory and unconstitutional. Notably, the Court did **not** conclude that the passage of time between *Bowers* and *Lawrence* compelled a different result, to the contrary, the Court held that *Bowers* was just as wrong in 1986 as it is now. *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today.") Discrimination is always wrong, and courts must protect the minority from discrimination and harm, notwithstanding the political sentiment of the moment.

Limiting marriage to opposite-sex couples does not serve any legitimate government purpose, but rather disserves the State's true interest in promoting the well-being of individuals, families, and children. As Justice Powell recognized, upholding this discriminatory law would be a mistake. Justice Powell recognized this too late, and the result was the perpetuation of discrimination against gays and lesbians for decades thereafter. For the reasons set forth above, Respondents respectfully request that the Court reconsider its decision, and affirm the rulings of the trial courts below.

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[6] Justice Powell's statement has been quoted in numerous press accounts, including a retrospective on his life published by the Washington Post, Aug. 26, 1998, at A1.

RESPECTFULLY SUBMITTED this 28th day of August, 2006.

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