

Supreme Court No. 75934-1

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

v.

KING COUNTY *et al.*, Appellants.

Appeal from the Superior Court of King County
The Honorable William L. Downing

**ANSWER OF RESPONDENTS HEATHER ANDERSEN AND
LESLIE CHRISTIAN *ET AL.* TO BRIEFS OF AMICI CURIAE**

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A. EXCLUDING SAME-SEX COUPLES FROM MARRIAGE DOES NOT BENEFIT ANYONE'S CHILDREN.

Amicus Families Northwest (FNW) and Amicus Alliance for Marriage (AFM) contend that the state may exclude same-sex couples from marriage because children are best raised by their married biological mothers and fathers. From their arguments, a reader might assume this case challenged all of the Washington laws that permit, recognize or facilitate divorce, adoption, assisted reproductive technologies, reproductive rights, and private sexual activity among consenting adults. However, Plaintiffs merely ask why, if marriage is good for children, its benefits should not be available to all children.

Indeed, the experts in child welfare – pediatricians, psychologists, social workers – support marriage rights for same-sex couples.¹ They do so because creditable research, properly interpreted, establishes that sexual orientation detracts not at all from a person's capacity to parent. *See* Br. Amicus American Psychological Association, at 5-8, 36-50; Br. Amicus

¹ *See, e.g.*, American Academy of Pediatrics, News Release: AAP Says Children of Same-Sex Couples Deserve Two Legally Recognized Parents (2004) (available at www.aap.org/advocacy/archives/febsamesex.htm); Am. Psychol. Ass'n, Resolution on Sexual Orientation and Marriage (2004) ("[p]sychological research on relationships and couples provides no evidence to justify discrimination against same-sex couples."); National Association of Social Workers, Lesbian, Gay and Bisexual Issues, reprinted in *Social Work Speaks: NASW Policy Statements 2003-2006* (6th ed. 2003); American Anthropological Association, Statement on Marriage and the Family (2004) (available at www.aaanet.org/press/ma_stmt_marriage.htm). *See, also*, North American Council on Adoptable Children (NACAC) and Child Welfare League of America (CWLA).

Children's Rights Organizations, at 7-15. Some time ago, this Court reached that same conclusion by common sense and common law alone. *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983).

However, this case is about marriage, and marriage is not a prize awarded by the state in a competition for best parenting configuration. It is a fundamental right that gays and lesbians who are parents seek, in part, to secure the welfare of their children. What Amici FNW and AFM fail to explain is how the extension of this right to same-sex couples in any way impairs the right of heterosexual couples to marry, their ability to parent, or the security of their children. Behind their arguments on behalf of a preferred family formation lies a false zero-sum game, which this Court should reject. Simply, depriving some children of the beneficial setting marriage offers does not enhance the welfare of children being raised in the setting Amici consider optimal.² Accordingly, the deprivation does not survive the constitutional requirement that classifications bear a just and reasonable relationship to their purpose.

² This claim of superiority echoes chillingly the claim of White superiority, "scientifically proved" and made by defenders of the miscegenation laws. See *Perez v. Sharp*, 32 Cal.2d 711, 720-728, 198 P.2d 17 (1948).

B. BECAUSE INDIANA'S CONSTITUTION APPARENTLY DOES NOT REQUIRE A RATIONAL BASIS FOR EXCLUDING SAME-SEX COUPLES FROM MARRIAGE, *MORRISON V. SADLER* IS NOT PERSUASIVE.

Amicus Marriage Law Foundation ("Amicus MLF") argues there is a "deep logic" in reserving marriage only to those who might unintentionally have children while excluding those who must deliberately set out to do so. Thus, Respondents David and Michael Serkin-Poole and Janet Helson and Betty Lundquist may parent the biological children of others, but must do so without the safeguards of the civil institution the progenitors declined or were unable to enter.³ On this view, marriage protects children who are the consequences of unthinking passion, but not children who are the consequences of deliberation.

MLF argues this Court should follow both this logic and the privileges and immunities analysis used by the Indiana Court of Appeal in *Morrison v. Sadler*, 821 N.E.2d 15 (2005), concluding that Indiana's exclusion of lesbian and gay couples from marriage does not offend its constitutional equality guarantee. But Washington's concern extends to all its children and Washington's constitution, unlike Indiana's, requires the State to justify unequal treatment of its citizens.

³ There are many reasons sexual-biological progenitors may choose not to marry, including youth, immaturity, mental incapacity, unsuitability, poverty, and imprisonment. Suffice it to say it is not always a bad thing.

Indeed, Indiana's standard of review for equality challenges differs from both Washington and federal law; in fact, it appears to be wholly unique, and uniquely toothless, in equality jurisprudence. For example, it treats all challenges the same, without regard to the type of classification. *Id.*, at 21. By contrast, Washington defers almost completely in matters economic and regulatory, but scrutinizes more intensely all other classifications. *In re Mota*, 114 Wn.2d 465, 473-74, 788 P.2d 538 (1990); *O'Day v. King County*, 109 Wn.2d 796, 749 P.2d 142 (1988); *Hanson v. Hutt*, 83 Wn.2d 195, 517 P.2d 599 (1973).

Second, as described in *Morrison*, Indiana jurisprudence forbids judicial inquiry into whether a law is passed with the deliberate goal of harming a particular minority group. *Id.* at 21, 27 ("We may not inquire into ... whether the legislature's true purpose was to discriminate against homosexual couples."). Thus, *Morrison* repudiates a core feature of equality doctrine: that animus can never be a legitimate governmental purpose. *Miguel v. Guess*, 112 Wn. App. 536, 553, 51 P.3d 89 (2002); accord *Romer v. Evans*, 517 U.S. 620, 633-34, 116 S. Ct. 1620, 134 L. Ed.2d 855 (1996); *Palmore v. Sidoti*, 466 U.S. 429, 432-33, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984).

Third, Indiana's test for whether discrimination advances a legitimate purpose is deferential to the point of meaninglessness, having

not once resulted in a facial invalidation of a statute. *Morrison*, at 22. Compare *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998). Thus, the *Morrison* court contrasted its test with Vermont's, which inquires "whether the exclusion of same-sex couples from the benefits of marriage bore a 'reasonable and just relation' to the governmental purpose of the exclusion." *Morrison* at 21, citing *Baker*, at 878-79. Washington's equality test operates like Vermont's, not like Indiana's, and looks for that real and crucial link between classification and purpose. *State ex rel. Bacich v. Huse*, 187 Wash. 75, 81, 59 P.2d 1101 (1936), cited in *Grant County Fire Protection District v. City of Moses Lake*, 145 Wn.2d 702, 732, 42 P.3d 394 (2002); accord *Baker*, at 879. Indeed, as the United States Supreme Court has observed, "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause." *Romer v. Evans*, 517 U.S. at 632.

The evisceration of this part of the usual equality analysis is accomplished in Indiana by turning the "search for the link" inside out. In Washington, classifications must "rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act." *Grant County I*, 145 Wn.2d at 732 (quoting *Bacich v. Huse*, 187 Wash. at 80). In other words, discrimination must be justified by a legitimate state interest that is somehow advanced by the discriminatory

classification. Indiana has this backwards; there, the excluded group must show that their inclusion will advance the state interest. Thus, if the State's interest in marriage is to encourage "responsible procreation," it is not enough that including same-sex couples will leave that interest unaffected; inclusion must actually encourage heterosexuals to procreate responsibly.

At best, this is a novel test. It is also one, however topsy-turvy, that our Plaintiffs may well satisfy. CP 892, 900 ("before the Court stand eight couples who credibly represent that they are ready and willing to make the right kind of commitment to partner and family for the right kind of reasons. . . . The characteristics embodied by these plaintiffs are ones that our society and the institution of marriage need more of, not less."). Moreover, Indiana's test assumes that marriage is a regulation of sexual activity, which it is not. And, remarkably, it ignores the concern behind the procreation: children, whose welfare indeed is advanced by the inclusion of same-sex couples in marriage. Indiana's analysis is, simply, out of step with Washington's constitution, this Court's constitutional analysis, this State's concern for all children, and, glaringly, out of step with logic.

C. THE PLAIN LANGUAGE OF THE EQUAL RIGHTS AMENDMENT, NOT LEGISLATIVE HISTORY, CONTROLS ITS APPLICATION.

Amicus United Families International (UFI) argues that “nothing in the text, history, purpose or interpretation of the equal rights amendment requires Washington to recognize same-sex marriage.” Br. Amicus UFI, at 3. To the contrary, DOMA unconstitutionally discriminates on account of sex under both the ERA’s plain language and its consistent interpretation by this Court.

During the debate on whether Washington should adopt an equal rights amendment, opponents argued that constitutionally enshrining sex equality would lead to same-sex marriage:

H.J.R. 61 would establish rules in our society which were not intended and which citizenry simply could not support. Examples are numerous: . . .

(3) Homosexual and lesbian marriage would be legalized with further complications regarding adopting children into such a “family”. People will live as they choose, but the beauty and sanctity of marriage must be preserved from such needless desecration.

1972 Voters Pamphlet, “Statement Against.” As Amicus UFI observes, many proponents of the ERA discounted the likelihood of such an outcome. Br. Amicus UFI, at 7-16. However, predictions on both sides are irrelevant. Because the language of the amendment is clear on its face, it requires no interpretation, including no resort to legislative history. *See*

American Continental Ins., Co v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). See also Rex E. Lee, *A Lawyer Looks at the Equal Rights Amendment* (BYU Press, 1980), at 65 (predictions would be irrelevant to interpretation of federal ERA). As Dean Lee concluded, under an absolute prohibition of gender discrimination like Washington's, the exclusion of same-sex couples from civil marriage would be unconstitutional:

Laws prohibiting homosexual marriages are the classic case of discrimination based on sex. Again, they prohibit men, solely because they are men, from doing what women are permitted to do: marry other men, and the proposition that such laws are based on a characteristic unique to one sex is insupportable.

Id. (criticizing *Singer v. Hara* for failing to "resolve or even consider the theoretical inconsistency" of its approach).

As this Court has repeatedly held, the intent of the Equal Rights Amendment is simple and sweeping: it protects Washington's citizens from a deprivation of rights "on account of sex." Rightly and necessarily, the amendment grows in meaning with application. Its implications are not entombed in the minds of its framers, but are made manifest in the lived experience of each generation. As four justices of this Court observed in one of the first ERA cases, "Whether the people in enacting the ERA fully contemplated and appreciated the result here reached, coupled with its prospective variations, may be questionable. Nevertheless, in sweeping language they embedded the principle of the

ERA in our constitution, and it is beyond the authority of this court to modify the people's will." *Darrin v. Gould*, 85 Wn.2d 859, 878, 550 P.2d 882 (1975) (Hamilton, J., concurring) (result that female students may play football "is dictated by the broad and mandatory language" of the ERA).

Any student of constitutional history knows that text acquires meaning over time. On this lesson, instruction may be found in federal constitutional analysis of the 14th Amendment's equal protection clause (EPC). Passed in 1868, in the aftermath of a war fought largely over slavery, the EPC was viewed as one means to eliminate discrimination against African-Americans. At first, the court narrowly restricted the scope of the clause to its intended beneficiaries:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause of the 14th Amendment]. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872). In short order, faced with challenges from Asian-Americans, the court reversed itself and extended the clause's protection to other races. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). For decades the court also embraced the view that equality was satisfied if the laws

applied equally, though separately, to citizens of different races. *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). Indeed, it has not been even 30 years since a divided United States Supreme Court rejected the "equal application" defense of miscegenation laws, declaring them unconstitutional because they "rest solely upon distinctions drawn according to race." *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

Originally the Fourteenth Amendment offered no promise of sex equality. Indeed, to the extent the debates on ratification of the Civil War Amendments considered women, proponents of passage assured skeptics that the equal protection clause would not lead to women being considered "persons," and thus entitled to equal treatment. Cong. Globe, 39th Cong., 1st Sess. 1064 (Sen. Hale), 2767 (Sen. Howard) (1866). So determined to exclude women were the authors, that they included in section two of the 14th Amendment the word "male" for the first time anywhere in the constitution. The exclusion of women led many abolitionists, who were also advocates of women's rights, to oppose passage. See 2 History of Woman Suffrage 90-151 (Elizabeth Cady Stanton, et al. eds., AYER Co. Publishers, 1985) (1882).

For a hundred years, courts consistently declined to extend in any meaningful way the "equal protection" of the laws to women. See, e.g.,

Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961);
Goesaert v. Cleary, 355 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948);
Bradwell v. Illinois, 83 U.S. 130, 21 L.Ed. 442 (1872). All that changed
with the interpretation given to the Amendment beginning in 1971 with
Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), which
was followed by a veritable and rapid sea-change in law-making across
the country. See, e.g., *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59
L.Ed.2d 306 (1979); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50
L.Ed.2d 397 (1976); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43
L.Ed.2d 688 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct.
1764, 36 L.Ed.2d 583 (1973). Thus, the remarkable advancement of
women's constitutional equality in recent decades is an *unintended*
consequence of the enactment of constitutional language that on its face
guarantees equality.

Unlike the 19th century framers of the 14th Amendment,
Washington's voters were expressly committed to the goal of equality,
adopting the "sweeping" language of the ERA despite warnings that it
might lead to same-sex marriage and a parade of other "horribles" (e.g.,
deny preferential treatment to women in divorce, require integrated sports
teams, require pregnancy leaves, allow women to serve their country in
combat). Contrary to Amicus UFI's argument, the ERA's intent is indeed

effectuated by a right to marry that does not discriminate on the basis of sex.

D. THE MINNESOTA COURT'S DECISION 34 YEARS AGO IN *BAKER V. NELSON* ON FEDERAL DUE PROCESS GROUNDS DOES NOT CONTROL INTERPRETATION OF THE WASHINGTON CONSTITUTION.

Amicus Family Research Council (FRC) argues that the fundamental right claim is controlled by the 34 year-old decision of the Minnesota Supreme Court in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 35 (1972). Br. Amicus FRC, at 14-20; see, also, Br. Amicus ACLJ, at 10-11. This argument is not well taken.

First, this Court is, of course, interpreting the due process guarantee of the *Washington* constitution. In doing so, this Court may refer to decisions interpreting the federal due process clause -- not as a matter of binding precedent, but rather as a matter of comity -- when the federal court analysis sheds light on the corresponding Washington constitutional provision. *Baker* fails this "helpfulness" requirement.

For example, Amici do not attempt to show how any part of the Minnesota court's actual analysis in *Baker* illuminates the interpretation of the Washington Constitution. To the contrary, Amici's argument is

limited to the erroneous contention that *Baker's* unique *procedural* posture makes the Minnesota court's decision binding on this Court.

However, even with respect to the federal constitution, summary dismissals from an appeal to the Supreme Court (almost all of which were abolished in 1988) are "not entitled to full precedential weight." *See Boggs v. Boggs*, 520 U.S. 833, 849, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997), (citing *Edelman v. Jordan*, 415 U.S. 651, 670-71, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)).

Finally, summary dismissals must be disregarded when subsequent "doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) *see also Jones v. Bates*, 127 F.3d 839, 851, n.13 (1997) (summary dismissal not binding where extensive intervening doctrinal developments strongly suggested that continued reliance was unwarranted).

The result in *Baker v. Nelson* therefore has no application in this case. The three-page decision of the Minnesota court does not show that the plaintiffs before it in 1971 were living committed lives together, adopting children and raising families, unlike Plaintiffs here. Neither the legal nor social framework to permit gay and lesbian couples even to live openly existed then. Beyond changed social attitudes, subsequent, significant "doctrinal developments" have made it clear that gay men and

lesbians have equality and liberty interests at stake unrecognized three decades ago. *See Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed.2d 855 (1996); *Lawrence v. Texas*, 539 U.S. 558, 571, 123 S. Ct. 2472, 156 L. Ed.2d 508 (2003) (noting “emerging awareness”):

Thus, *Baker* is not controlling even of the federal question.

Certainly, and contrary to Amici’s suggestion, this Court’s interpretation of the Washington Constitution is not controlled by a cursory Minnesota decision that the United States Supreme Court declined to examine more than a third of a century ago.

E. THE NARROW CONSTRUCTION OF LIBERTY IN *GLUCKSBERG* DOES NOT CONTROL WASHINGTON’S CONSTITUTION, NOR DOES IT PERSUADE IN CASES INVOLVING RELATIONAL RIGHTS.

Amicus American Center for Law & Justice (ACLJ) argues that under the United States Constitution there is no fundamental right to “same-sex marriage,” relying on *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L.Ed.2d 772 (1997). Amicus ignores both that Plaintiffs look to Washington’s constitution for their relief, not to the federal constitution, and they ignore *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed.2d 508 (2003), and a plethora of other cases, which, unlike *Glucksberg*, articulates the federal liberty analysis that applies

when the State would intrude into the traditionally protected area of personal relationships.

Glucksberg concerned the constitutionality of Washington's law banning assisted suicide. The United States Supreme Court rejected a due process challenge to the ban, holding that there was no fundamental right at issue because Americans have never had a tradition of assisted suicide. By contrast, this case concerns the right to choose a marriage partner, which is a deeply rooted tradition, a distinction expressly recognized in *Glucksberg*: "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right to marry, ..."
Glucksberg, 521 U.S. at 720; *see also City of Bremerton v. Widell*, 146 Wn.2d 561, 580, 51 P.3d 733 (2002) (state may not hinder the "ability to marry the person of their choosing"). Here, the State denies each plaintiff the right to choose his or her marriage partner, thereby abridging a traditional right all Americans have long enjoyed.

The nature of the right at issue here – this right to choose whom to marry – engages a liberty analysis that, in federal jurisprudence, is well-established and looks not merely to tradition, but to the future. In this analysis, liberty is among the "[g]reat [constitutional] concepts ... purposely left to gather meaning from experience...." *Board of Regents of*

State Colleges v. Roth, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972), quoting *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 1209, 93 L.Ed. 1556 (1949) (Frankfurter, J., dissenting).

Analysis of the protections liberty affords to decisions affecting personal relationships has done precisely that: gathered meaning from experience. Unlike the narrow construction of the interest at stake in *Glucksberg*, these cases demarcate in broad terms the liberty in this personal realm that the U.S. constitution protects. For example, the early due process cases are not reductively read as protecting merely the decisions to send one's child to religious school (*Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925)) or to have one's child taught in the German language (*Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923)). Rather, these particular child-rearing decisions are encompassed in the broader right of parents to rear their children as they, not the State, see fit.

Similarly, the court did not decide that Jack Skinner had a particular right not to be castrated, but that he had a right to procreate and form a family. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Nor did the court uphold a narrow right not to pay child support, but the broader right to marry. *Zablocki v. Redhail*, 434

U.S. 374, 98 S. Ct. 673, 54 L. Ed.2d 618 (1978). Likewise, the decisions whether and when to become a parent are not reduced to decisions to buy contraception (*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)) or to terminate (or continue) a pregnancy (*Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)), but to engage in private and personal decision-making about becoming a parent without state interference. These decisions, “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Southeastern Pa. v. Casey*, 505 U.S. 833, 851, 112 S. Ct. 2791, 120 L. Ed.2d 674 (1992).

Likewise addressing itself to the formation of intimate, personal relationships, *Lawrence* embraced this living and breathing view of substantive due process, taking its place in “the long line of decisions that described the protected liberties at higher levels of generality [footnote omitted] than any ‘protected activities’ catalog could plausibly accommodate, . . .” Lawrence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1934 (2004). It is not coincidental that the Court in *Lawrence* spoke not just of sex, but of relationship, observing that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can

be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.” *Lawrence*, 539 U.S. at 567. Thus, both implicitly and explicitly, the court rejected how the court in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed.2d 140 (1986) reduced the claimed liberty interest to a particular kind of sexual act. In like fashion, this Court should reject the argument that these couples seek a right to “same-sex marriage,” when in fact they seek simply the same right to marry – to marry the person of their choice – as is enjoyed by different-sex couples.

Thus, not only does *Glucksberg* address a kind of decision unrecognizable in the broad conceptualization of the liberty interest in personal relationships, it approaches the analysis as *Bowers* did: as a process of checking a claimed right against a list cemented in a historical moment. Both cases can be described as efforts “to collapse claims of liberty into the unidimensional and binary business of determining which personal activities belong to the historically venerated catalog of privileged acts and which do not, ...” Tribe, 117 Harv. L. Rev. at 1924. The problem for Amicus ACLJ is that the U.S. Supreme Court both more commonly, more broadly, and more recently has embraced a far different, far more dynamic structure for analysis of liberty as it involves the formation and sustaining of personal relationships.

Finally, and crucially, the Plaintiffs here seek vindication of their right to marry under the constitution of this State, which exercised its “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.” *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 223, 840 P.2d 174 (1992). This constitutional orientation makes all the more persuasive the line of federal precedent concerning personal relationships culminating, so far, in *Lawrence*. In Washington, with its constitutional exhortation for “recurrence to fundamental principles” (Const. art 1, § 32), there is all the more reason for liberty to gather meaning with experience, as these federal cases do. And all the more reason to reject the effort to reduce and trivialize the right sought here by Plaintiffs: the right to marriage, not to “same-sex marriage.”

F. REYNOLDS DOES NOT APPLY BECAUSE THIS CASE RAISES NO CHALLENGE TO MONOGAMOUS MARRIAGE NOR ANY QUESTION OF RELIGIOUS FREEDOM.

Amicus Concerned Women for America (“CWA”) argues that governments have broad power to restrict marriage, citing as support *Reynolds v. United States*, 98 U.S. 145, 8 Otto 145, 25 L.Ed. 244 (1878), in which the U.S. Supreme Court upheld a polygamy conviction under the

free exercise clause of the federal constitution. CWA's reliance on *Reynolds* is unavailing.

First, the Plaintiffs here share with CWA a commitment to monogamous marriage; they want only to marry that one other person to whom they have committed their love and their lives. They should not have to defend against a speculative claim brought by speculative plaintiffs. They should not have to defend against "bogey" arguments designed to frighten and distract.

Second, *Reynolds* involved a constitutional right not at issue in this case (the free exercise right) and a different constitution (the federal constitution). The U.S. Supreme Court considered only the interaction between the restraint on plural marriage and the free exercise of religion; it expressly did not consider the application of other constitutional protections on the government's power to regulate marriage. Tellingly, CWA quotes selectively from *Reynolds* to claim that marriage regulation is "within the legitimate scope of the power of every civil government" (CWA Brief at 12), but omits the court's important qualifier: "unless restricted by some form of constitution." *Reynolds*, at 166. Of course, here the question is whether DOMA violates Washington's constitutional protection of liberty, privacy, equality, and sex equality, not the protection of religious freedom. Plaintiffs' claim involves absolutely no question of

religious freedom, neither a religion's freedom to sanctify nor to refuse to sanctify the civil marriages sought here.

G. THIS COURT, IN ITS PROPER ROLE, DETERMINES THE CONSTITUTIONALITY OF STATUTES.

Amicus American Center for Law & Justice (ACLJ), dedicated "to preventing the erosion of traditional moral values via judicial fiat," argues this Court should leave to the legislature whether discriminating in marriage law offends Washington's constitution. Br. Amicus ACLJ, at 1. The California court rejected a similar argument in 1948 when it struck down that state's miscegenation law. *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948). In fact, it is the judiciary that has "the ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the constitution." *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978); accord *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 812 P.3d 583 (2001); *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000); *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 218, 5 P.3d 691 (2000). Indeed, the court has a special role to play in protecting the rights of minorities. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 948, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) ("The equal protection rights of minority voters thus could have remained


unrealized absent the Judiciary's close surveillance."); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (protecting minority voting rights against legislatively enacted impediments).

Other state courts tackling this same issue have acknowledged the court's role in upholding the constitution, even where a majority of the general public would seem opposed. The Massachusetts court embraced "the traditional and settled role of courts to decide constitutional issues." *Goodridge v. Department of Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). In this case, Judges Downing and Hicks likewise understood the wisdom of the independent judiciary as a co-equal branch of the government. Most recently, a New York trial court underscored this point in concluding that New York State's Domestic Relations Law is unconstitutional to the extent it denies the right to marry to same sex couples. *Hernandez et al. v. Robles*, No. 103434/2004, slip. op. at 58 (N.Y. Sup. Ct. February 4, 2005). Rejecting the defendant City of New York's argument that the decision to allow same-sex couples to enter into civil marriages should be made by the legislature rather than the courts, the court noted the same "deference" argument was "similarly used to urge the United States Supreme Court to uphold racial classifications in marriage in *Loving v. Virginia*," *supra*, at 55-56. It was untenable then and is untenable now.


DATED this 23rd day of February, 2005.

Respectfully submitted,

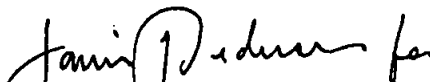
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