

NOS. 75934-1, 75956-1

**SUPREME COURT OF
THE STATE OF WASHINGTON**

HEATHER ANDERSEN, et al., *Respondents*,

v.

KING COUNTY, et al., *Appellants*,

v.

STATE OF WASHINGTON, *Appellant*,

and

SENATOR VAL STEVENS, et al., *Intervenor Appellants*.

Appeal From The Superior Court Of King County
The Honorable William L. Downing

CECELIA CASTLE, et al., *Respondents*,

v.

STATE OF WASHINGTON, *Appellant*.

Appeal From The Superior Court Of Thurston County
The Honorable Richard D. Hicks

**APPELLANT STATE OF WASHINGTON'S REPLY TO
SUPPLEMENTAL BRIEF OF RESPONDENTS CASTLE**

ROB MCKENNA
Attorney General

William B. Collins, WSBA 785
Senior Assistant Attorney General

PO Box 40100
Olympia, WA 98504-0100
360-753-6200

Attorneys For The State Of Washington

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1. Introduction

This supplemental brief is submitted in response to the Court's Order Granting Motion To File Supplemental Brief dated May 4, 2005. Respondent Castle's supplemental brief addressed the issue of the standard for federal rational basis review of statutes motivated by animus. The state addressed this point in its reply brief. State Reply Br. at 25-26.

2. Animus On The Part Of Some Does Not Establish That The Legislature Had A Discriminatory Intent

The remarks of some of the witnesses who testified in favor of the Defense Of Marriage Act (DOMA) and some of the legislators who supported the act could be evidence that these individuals were motivated by animus toward gays and lesbians. Anderson and Castle both cited examples of such in their briefs. Anderson Br. at 75; Castle Br. at 29-30. However, the fact that animus may have been the motive of some supporters does not mean that the Legislature had an improper motive. As the Supreme Court explained in *United States v. O'Brien*, 391 U.S. 367, 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

Indeed, this Court should be cautious about invalidating any law based on its interpretation of legislative motives. "Inquiries into

congressional [or legislative] motives or purposes are a hazardous matter.” *O’Brien*, 391 U.S. at 383. Of course, the court does look to the statements of individual legislators when interpreting statutes. This is permissible because “the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress’ purpose”. *Id.* at 383-84. However, it “is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen [or legislators] said about it”. *Id.* at 384.

3. Even Without DOMA, The Definition Of Marriage In Washington Would Be The Relationship Between A Man And A Woman

Even assuming, for the sake of argument, that the Legislature was motivated by animus toward gays and lesbians when it enacted DOMA, that does not render the law unconstitutional. Rather, it shifts to the state the “burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered”. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 270 n.21, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). *See also State v. Brayman*, 110 Wn.2d 183, 205, 751 P.2d 294 (1988) (Even if legislative intent could be a basis for holding a law unconstitutional, it would apply only if “the State cannot demonstrate that the law would have been enacted without this

factor”. *Id.* at 204). While the burden is on the state, there is no heightened scrutiny. Rather, the state must only show “*by a preponderance of the evidence* that it would have reached the same decision”. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

Once the state establishes that the same decision would have been made “the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose”. *Village of Arlington Heights*, 429 U.S. at 270 n.21.

In the instant case, DOMA defined marriage as: “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) (emphasis added). RCW 26.04.020(1) provides: “*Marriages* in the following cases are *prohibited* . . . (c) When the *parties are persons other than a male and a female*.” (Emphasis added.) But even without DOMA, Washington law has defined marriage as the relationship between a man and a woman—and has prohibited same-sex marriage. Thus, in territorial days prior to statehood, the Code of Washington § 2380 (1881) provided: “Marriage is a civil contract which may be entered into *by males of the age of twenty-one years, and females of the age of eighteen years*, who are otherwise capable.” (Emphasis added.) Although the statutes governing

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marriage have been amended over the years, this central characteristic of marriage remained the same. In 1970, RCW 26.04.010 was amended to provide that “[m]arriage is a civil contract which may be entered into by persons of the age of eighteen years, who are otherwise capable.” Laws of 1970, 1st Ex. Sess., ch. 17, § 2. Although the new language eliminated the reference to “males” and “females”, the Court of Appeals in *Singer v. Hara*, 11 Wn. App. 247, 250, 522 P.2d 1187 (1974), *review denied*, 84 Wn.2d 1008 (1974), held that “the applicable marriage statutes do not permit same-sex marriage”.

Neither Anderson nor Castle suggest that the Legislature’s decision prior to DOMA – in territorial days or later – to limit marriage to the relationship between a man and a woman was motivated by an animus toward gays and lesbians. Thus, even assuming DOMA was motivated by animus, the Legislature limited marriage to the relationship between a man and a woman when no animus was present. Even if DOMA had not passed, the Washington law would have prohibited same-sex marriage.

4. The Legislature’s Decision Is Supported By A Rational Basis

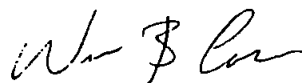
Castle renews the argument that the state cannot establish a rational basis to limit marriage to a man and a woman in light of other state laws relating to procreation, child-rearing, and assisted reproduction. Castle Suppl. Br. at 3-4. But there is at least one rational basis. The

sexual union of a man and a woman can result in children. Thus, it is rational for the state to encourage the sexual relationship between men and women to take place in the context of marriage. The "institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly". *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005).

The state does not have the same interest with regard to same-sex couples because their sexual relationship can never result in children. Thus, the recognition of same-sex marriage would not further this interest in heterosexual "responsible procreation". *Id.*

RESPECTFULLY SUBMITTED this 24th day of May, 2005.

ROB MCKENNA
Attorney General



William B. Collins, WSBA 785
Senior Assistant Attorney General

PO Box 40100
Olympia, WA 98504-0100
360-753-6200
Attorneys For The State Of Washington

Andersen v. King County

Attorneys For Respondents:

Patricia Novotny, WSBA 13604
3418 NE 65th Street Suite A
Seattle, WA 98115
206-525-0711

Hellsell Fetterman LLP
Bradley H. Bagshaw, WSBA 11729
Jennifer S. Divine, WSBA 22770
1001 4th Avenue Suite 4200
Seattle, WA 98154
206-292-1144

Lambda Legal Defense And Education
Fund, Inc.
Jennifer C. Pizer, *Pro Hac Vice*
3325 Wilshire Boulevard
Suite 1300
Los Angeles, CA 90010-1729
213-382-7600 ext. 223

Northwest Women's Law Center
Lisa M. Stone, WSBA 15421
Nancy Sapiro, WSBA 18751
3161 Elliott Avenue Suite 101
Seattle, WA 98121
206-682-9552

Preston Gates & Ellis LLP
Jamie D. Pedersen, WSBA 24690
925 4th Avenue Suite 2900
Seattle, WA 98104
206-623-7580

Attorneys For Appellant King County:

Norm Maleng
King County Prosecuting Attorney
Darren Carnell, WSBA 25347
Janine Jolly, WSBA 27314
Kristofer Bundy, WSBA 19840
Sr. Deputy Prosecuting Attorneys
E550 King County Courthouse
516 3rd Avenue
Seattle, WA 98104

Attorneys For Intervenor Appellants:

Ellis Li McKinstry PLLC
Steven T. O'Ban, WSBA 17265
Kristin K. Waggoner, WSBA 27790
Glen Lavey, *Pro Hac Vice*
Jordan Lorence, *Pro Hac Vice*
Gary S. McCaleb, *Pro Hac Vice*
2 Union Square
601 Union Street Suite 4900
Seattle, WA 98101-3906

Castle v. State

Attorneys For Respondents On Behalf Of The ACLU

Paul J. Lawrence
Matthew J. Segal
Preston Gates & Ellis
925 4th Avenue Suite 2900
Seattle, WA 98104-1158

Roger A. Leishman
Jennifer K.T. Warner
Davis Wright Tremaine
1501 4th Avenue Suite 2600
Seattle, WA 98101-1688

Aaron H. Caplan
American Civil Liberties Union of Washington
705 2nd Avenue Suite 300
Seattle, WA 98104-1799

Karolyn A. Hicks
Stokes Lawrence
800 5th Avenue Suite 4000
Seattle, WA 98104-3179