

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.*,  
STATE OF WASHINGTON,  
SENATOR VAL STEVENS, *et al.*,

Appellants.

FILED  
SUPERIOR COURT  
OF WASHINGTON  
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**BRIEF *AMICUS CURIAE* OF FAMILY RESEARCH COUNCIL  
IN SUPPORT OF APPELLANTS, URGING REVERSAL**

✓ David R. Langdon *DR Langdon*  
(OH Bar No. 0067046)  
LANGDON & SHAFER LLC  
11175 Reading Road, Ste. 103  
Cincinnati, Ohio 45241  
Telephone: (513) 733-1038

Todd M. Nelson  
(WA Bar No. 18129)  
600 Stewart Street, Ste. 1920  
Seattle, WA 98101  
Telephone (206) 269-8290

*Attorneys for Amicus Curiae  
Family Research Council*

**ORIGINAL**

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## **INTEREST OF *AMICUS CURIAE***

Family Research Council (FRC) is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. FRC provides research and policy analysis for the legislative, executive, and judicial branches of the federal and state governments on a variety of family-related issues, including marriage. FRC regularly participates as *amicus curiae* in cases before the United States Supreme Court and other federal and state courts, including many of the recent cases around the country challenging the institution of marriage.

## **STATEMENT OF THE CASE**

*Amicus* adopts the Appellants-Intervenors' Statement of the Case.

## **ARGUMENT**

### **I. INTRODUCTION**

It is an irony of Plaintiffs' complaints filed in this case that the documents commence their respective presentations with a confident definition of the structure of marriage, clearly limiting it to two individuals. To the extent that Plaintiffs insist on the importance to marriage of the preservation of this characteristic, or concede the ontological significance to marriage of that (or any) trait, the Plaintiffs in theory are conceding that marriage, to be marriage, must maintain a

particular structure. Yet the arguments they submit in this case in favor of the redefining of marriage take no cognizance whatever of the notion that marriage is not amenable to random reconfiguring, and certainly do not countenance that there is a legitimate justification for its enduring structure. In this Plaintiffs are decidedly wrong. Indeed, their arguments falter on nearly every point on which analysis can be engaged: from the aptitude of the state constitutional provisions chosen to address their complaint, to the operation of the analysis that governs their claims, even as they are mistakenly postured. It is the intention of this limited presentation to demonstrate that Plaintiffs are without a remedy under either the privileges and immunities clause or the due process clause of the Washington Constitution for their dissatisfaction with the state's accommodation of our civilization's consensus on the design of marriage, as reflected in RCW 26.04.010, *et seq.*

**II. THE DESIGN OF PLAINTIFFS' PRIVILEGES AND IMMUNITIES CLAIM DEMONSTRATES A MISAPPREHENSION OF THE NATURE OF THE CONSTITUTIONAL PROVISION UPON WHICH THEY PURPORT TO RELY.**

The historic definition and design of the marriage contract is not subject to condemnation under article I, section 12 of the state constitution, which provision only forbids certain restricted grants of favorable privileges and immunities (neither of which categories are

contained in the law defining the boundaries of marriage participation). See RCW 26.040.010, *et seq.* Other pieces of legislation in the state certainly do grant certain benefits to individuals who are married (thus relying on the status of married individuals), but these benefits are not what Plaintiffs challenge in their lawsuit. This marked structural deficiency not only dooms Plaintiffs' privileges and immunities claim, but also unmask their intentions. The benefits accorded those who are married is not their main objective, but rather the status and social validation that attends to those who may be identified as "married." Plaintiffs' attenuated "benefits" discussion is used only in a misguided attempt to shoehorn their marriage status attack into a privileges and immunities issue; it is at once a tactic to preserve surface plausibility to Plaintiffs' constitutional claim, as well as a glaring indicator of their defective effort.<sup>1</sup>

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<sup>1</sup> This defect is made evident when contrasting Plaintiffs' challenge herein to that of the plaintiffs in *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502, 520, 971 P.2d 435 (1998), a case (blindly) relied upon by the *Castle* court below. In *Tanner*, the plaintiff challenged, on the basis of article 1, section 20 of the Oregon Constitution, a university policy which granted insurance benefits to spouses of married employees, but did not allow such benefits to unmarried domestic partners (including same-sex domestic partners). The plaintiffs sought to have the benefit that was given to spouses (*i.e.*, insurance benefits) also given to domestic partners, and challenged the policy that restricted this benefit to spouses. Here, Plaintiffs generally allege they desire benefits given to those who are spouses, but by contrast, they do not seek to have those benefits extended (like in *Tanner*) to those who are similarly situated non-spouses. Rather, they seek to have this Court announce that Plaintiffs must be allowed to turn themselves into "spouses" so as to obtain the benefits accorded those in that category. This is nothing like what *Tanner* accomplished or authorizes, and Plaintiffs' appeal to that case for authority for their petition, which is clearly distinct from that presented in *Tanner*, is quite mistaken.

Because the law Plaintiffs challenge herein (which defines the parameters of the civil marriage contract) does not grant any privileges or immunities, and because any other laws which may grant privileges and immunities to individuals based on marital status are not challenged as unconstitutionally underinclusive, the structural configuration of Plaintiffs' legal challenge has guaranteed its failure. This is the inevitable result of Plaintiffs' misguided lawsuit, which seeks to make use of a constitutional provision in a manner its nature and authority will not allow. Plaintiffs want to redefine the civil contract of marriage.<sup>2</sup> In such an effort, article I, section 12 of the state constitution has no utility.

Rather than attacking the myriad of statutory and other benefits attendant to marriage in this state (and asserting that such benefits constitute "privileges" under the privileges and immunities clause), Plaintiffs claim that marriage itself is a "privilege" which they *as couples* cannot be denied. (Obviously, they have not asserted nor could they reasonably assert that they *as individuals* have been denied the ability to marry.<sup>3</sup>) Assuming this Court agrees with Judge Hicks' *Gunwall* analysis

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<sup>2</sup> Because of the continual announcements by homosexual rights activists of their self-perception as inheritors of the mantle of the civil rights movement, let us imagine if the black civil rights movement, say, had proceeded similarly to how Plaintiffs do now: by demanding that the courts redefine what it means to be white, so that blacks could be considered by law as white, and enjoy all the privileges and immunities that come from that white status.

<sup>3</sup> As individuals, or as a class comprised of individuals, it is evident that the marriage right as set forth in RCW 26.04.010, *et seq.* is not being denied to Plaintiffs.

(concluding that the privileges and immunities clause affords greater protection to Plaintiffs than the federal Equal Protection Clause), the Court must determine whether the right to marry constitutes a “privilege” within the meaning of article I, section 12 of the state constitution. See *Grant Cty. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004) (“*Grant County II*”) (unless the challenged statutory right is a “privilege” within the meaning of article I, section 12, “no unconstitutionality may be found.”).

In this context (wherein the Court has concluded under *Gunwall* that the privileges and immunities clause affords greater protection than the federal Equal Protection Clause), the terms “privileges and immunities” have a wholly distinct meaning than is generally accorded to them in the equal protection context. See *Grant County Fire Protection Dist. No. 5 v. City of Yakima*, 145 Wn.2d 702, 745-750, 42 P.3d 394 (2002) (Sanders, J., dissenting); *Grant County II* at 816-821 (Sanders, J., concurring). Indeed, as this Court “made quite clear early in this State’s history,” the terms

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Without exception, all those adults who comprise the ostensive class “homosexual” are permitted to marry. As a consequence of this truth, the sleight-of-hand which seeks to identify the relevant class as comprised of “couples” is introduced. On this rendition, “couples” are not permitted to marry. Essentially what is complained is that marriage is not defined to include same-sex relationships. This, however, is very different from asserting that homosexuals are not permitted to marry. They clearly are.

pertain alone to those *fundamental rights* which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in [section 2, article IV of] the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, *Constitutional Limitations* (6th ed.) 597. *By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.*<sup>4</sup>

*Grant County II* at 812-813 (emphasis added) (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). It is this question—whether marriage is a “fundamental right” *within the scope of the privileges and immunities clause*—that must be answered (and neither the courts below nor the parties have yet to do so). To do so, the Court must consider the meaning of “fundamental” under section 2, article IV of the United States Constitution, and the rights that have been classified as such under that provision. See *Grant County II*, 150 Wn.2d at 813.<sup>5</sup>

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<sup>4</sup> In this statement, Cooley was referring only to section 2, article IV of the United States Constitution, and not the privileges or immunities clause of the fourteenth amendment. See *Maxwell v. Bugbee*, 250 U.S. 525 (1919); *Marsh v. Steele*, 9 Neb. 96, 1 N.W. 869 (1879); *Benson v. Schneider*, 68 N.W.2d 665 (N.D. 1955).

<sup>5</sup> While the parties and the courts below point to decisions in other legal contexts to try to assert that marriage is a “fundamental” right under the state privileges and immunities clause, “the true comparison should be [to] the privileges and immunities clause of the United States Constitution.” *Grant County II* at 817 (Sanders, J., concurring).

**A. The Privileges and Immunities Clause of the United States Constitution (cl. 1, § 2, art. IV).**

The Privileges and Immunities Clause provides that the “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2, cl. 1. Under the Clause, “a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the ‘Privileges and Immunities of Citizens in the several States’ that he visits.” *Saenz v. Roe*, 526 U.S. 489, 501 (1999).

The basic standard for what the Clause does cover is well established:

The Supreme Court has settled upon a two-part standard for assessing challenges brought under the Clause, once [a] classification burdening out-of-staters is established. First, courts must determine whether the classification strikes at the heart of an interest so “fundamental” that its derogation would “hinder the formation, the purpose, or the development of a single Union of the States.” *Baldwin*, 436 U.S. at 383. ... If the classification bears on such a “fundamental” right, the analysis proceeds to a second stage, whether the defendant can overcome the challenge by showing a “substantial reason” for the difference in treatment.

*Utility Contractors Ass’n v. Worcester*, 236 F. Supp.2d 113, 117-18 (D. Mass. 2002) (quoting *United Building v. Camden*, 465 U.S. 208, 222 (1984)).

The Privileges and Immunities Clause does not prohibit all differential treatment by one state of citizens of other states; rather, it applies only to those rights that “bear on the vitality of the Nation as a single entity,” *i.e.*, those that are “sufficiently basic to the livelihood of the Nation” to be termed “fundamental.” *Baldwin v. Montana Fish and Game Comm’n*, 436 U.S. 371, 388 (1978). “The term ‘fundamental’ has been used to describe several very different concepts in constitutional analysis.” *Mass. Council of Const. Emp., Inc. v. Mayor of Boston*, 384 Mass. 466, 474 (1981). Whether a right is fundamental for Fourteenth Amendment purposes is thus not dispositive in the Privileges and Immunities context. *Id.* at 474-75; *Daly v. Harris*, 215 F. Supp.2d 1098, 1111 n.17 (D. Hawaii 2002) (“The Court is not persuaded that all rights protected by the Fourteenth Amendment are necessarily ‘fundamental’ for purposes of the Privileges and Immunities Clause”). Indeed, in *Laborers Local Union No. 374 v. Felton Construction Company*, 98 Wn.2d 121, 654 P.2d 67 (1982), this Court held that “the threshold inquiry” in determining if state legislation violates the (federal) Privileges and Immunities Clause “is whether the interest subject to state legislation is a privilege or immunity within the meaning of the clause.” *Id.* at 125 (citing *Baldwin, supra*). The Court stated:

Addressing *Baldwin's* threshold question, we must first clarify the meaning of the term "fundamental." \*\*\* *In its use of the term, the Court did not mean to embrace the analytical structure for identifying fundamental rights requiring strict scrutiny under the equal protection clause.* To the extent the term "fundamental" is helpful, it points to those interests "basic to the maintenance or well-being of the Union."

*Laborers Local*, 98 Wn.2d at 126 (quoting *Baldwin*, 436 U.S. at 388) (emphasis added). In other words, the meaning of "fundamental right" under the Privileges and Immunities Clause is wholly distinct from the meaning of "fundamental right" in the substantive due process context, because the (former) "Clause was intended to create a national economic union." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 (1985).

Consistent with this overwhelmingly economic focus, the Supreme Court to date has recognized only four categories of activity as "fundamental" for (federal) Privileges and Immunities purposes: (1) pursuit of a trade, business, or profession; (2) ownership and transfer of property; (3) access to the courts; and (4) payment of taxes on the same footing as state residents. *Baldwin*, 436 U.S. at 383. Not surprisingly, no court has held that marriage is a fundamental right within the meaning of the federal Privileges and Immunities Clause.<sup>6</sup>

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<sup>6</sup> Indeed, two courts have recently affirmed that marriage is *not* a "fundamental right" within the meaning of the Privileges and Immunities Clause of section 2, article IV

**B. Marriage is not a “privilege” within the meaning of the privileges and immunities clause.**

Against that backdrop, it likewise cannot be legitimately disputed that marriage is not a “privilege” within the meaning of article I, section 12 of the Washington Constitution. Marriage is not a “fundamental right[] which belong[s] to the citizens of the state *by reason of such citizenship.*” See *Grant County II* at 812 (emphasis added). (Indeed, a person is not even required to be a citizen of Washington in order to be married under its laws. See RCW 26.04.010, *et seq.*) Nor does it fit into any of the four categories of activity deemed by the Supreme Court as “fundamental” for Privileges and Immunities purposes, or within any of the distinctly economic categories identified in *Grant County II*, such as the “right to remove and carry on business” in the state, “to acquire and hold property” in the state (and “to protect and defend the same”), to “collect debts,” and so forth. *Id.*<sup>7</sup>

Accordingly, under the authority of *Grant County II* and its unbroken chain of precedents dating back to *State v. Vance* in 1902,

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(continued...)

of the United States Constitution. See *Wilson v. Ake*, No. 8:04-cv-1680-T-30TBM, 2005 U.S. Dist. LEXIS 755 (M.D. Fla. Jan. 19, 2005) (rejecting federal Privileges and Immunities challenge to Florida marriage law prohibiting same-sex “marriage”); *Cote-Whitacre v. Mass. Dept. of Public Health*, Sup’r Ct. No. 04-2656-G (Aug. 18, 2004) (marriage is not a fundamental right under federal Privileges & Immunities Clause).

<sup>7</sup> While the “marriage industry” may provide ancillary economic benefits, the basic conclusion remains unaltered.

marriage is not a “privilege” within the meaning of article I, section 12 of the Washington Constitution, and Plaintiffs’ claim brought under that provision plainly fails.

**III. THE “FUNDAMENTAL RIGHT” TO MARRY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION ENCOMPASSES ONLY THE UNION OF ONE MAN AND ONE WOMAN.**

Plaintiffs also contend that the state’s marriage statutes violate their “fundamental right” to marry under article I, section 3 of the Washington Constitution.<sup>8</sup> However, as the fundamental right to marry is one that applies only to opposite sex couples, its existence is of no assistance to Plaintiffs’ cause. The innovative nature of Plaintiffs’ proposal is the very reason that the continual appeal to the “fundamental right of marriage” in support of their claim is so peculiar. The fact that opposite-sex marriage is a right of fundamental standing under the law would seem to lend no legal or logical support for the proposal that this Court should stipulate a different conception of marriage than that which now exists as a fundamental right, and impose it on the state, particularly when faced with the venerable and compelling cloud of witnesses standing in opposition to their cause. Apart from this *prima facie* implausibility of Plaintiffs’ use of opposite-sex marriage jurisprudence as tools for their

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<sup>8</sup> In this section, “fundamental right” refers to those rights that have developed out of a substantive due process analysis.

demand, there is their more committed failure to interact with that surface implausibility so as to dispatch the concern and present an explanatory bridge from these cases to their own cause. But Plaintiffs proceed as if the problem does not exist.

**A. No court has held that the fundamental right to marry includes the right to marry someone of the same sex.**

While Plaintiffs insist the right they seek recognized is not new, signally absent from their discussion is even one precedent from any section of American jurisprudence which demonstrates that the “fundamental” right they assert exists. The numerous citations to cases heralding a right to marry an opposite-sex partner only reinforce the propriety of the exclusion the law now reflects. Consequently, no value can accrue to Plaintiffs in carrying on about the exalted and protected status of marriage. The toil they expend on pointing out the fundamental nature of the right to marry, because expended while concurrently ignoring the exclusively opposite-sex nature of the right they discuss, is a wasted effort.

In instances of marriage prohibitions which were struck as constitutionally infirm, such as those based on miscegenation laws, *Loving v. Virginia*, 388 U.S. 1 (1967), incarceration of the betrothed, *Turner v. Safley*, 482 U.S. 78 (1987), and unmet child-support obligations, *Zablocki*

*v. Redhail*, 434 U.S. 374 (1978), all parties therein could find proper appeal to the fundamental right of marriage, because no element in those relationships—race, incarceration, indebtedness—implicate factors that struck at the definition of the right at issue. This distinction is what separates the Plaintiffs’ request from those in the *Loving* line of cases. More than child support arrears and melanin are implicated in Plaintiffs’ claim. The profound and complementary nature of the union of man and woman that constitutes a marriage is at issue.

For this purpose the Kentucky Appeals Court in *Jones v. Hallahan*, 501 S.W.2d 588, 589 (1973) was not “circular” in its reasoning, but rather identified something fundamental when it pointed out that the appellants in that case which sought the right to marry someone of the same sex “are prevented from marrying, not by the statutes of Kentucky ... but rather by their own incapability of entering into a marriage as that term is defined.” Marriage cannot be altered in the dramatic fashion that Plaintiffs petition without it losing its very ontological character. As elaborated below, the state due process clause certainly provides no warrant for such an upheaval.

**B. Plaintiffs' substantive due process claim is subject to evaluation under the federal Due Process Clause.**

As the State correctly asserts in its Reply Brief (at p. 10), because Plaintiffs did not adequately address the principles announced in *State v. Gunwall* in connection with their claim under the state due process clause, that claim must be evaluated by this Court under the federal Due Process Clause. See *In re the Personal Restraint of Matteson*, 142 Wn.2d 298, 311, 12 P.3d 585 (2000). Respondents of course challenge that notion, asserting that because “there is no dispositive federal law” applicable to their claim that same-sex couples have a “fundamental right” to marry under the federal Due Process Clause, a *Gunwall* analysis was not necessary. Andersen Brief, at 18. However, if by their use of the term “dispositive” Respondents mean to suggest that the United States Supreme Court has not addressed the question raised herein, they are mistaken, for that Court has indeed decided the merits of a similar constitutional challenge to marriage laws. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). As elaborated below, it is upon the binding authority of that decision that this Court must reject Plaintiffs' due process claim.

In *Baker*, the United States Supreme Court considered and rejected the claims by two men that Minnesota's exclusion of same-sex couples

from marriage violated the Ninth and Fourteenth Amendments to the United States Constitution. The Court upheld the Minnesota Supreme Court's ruling that there is no fundamental right to same-sex "marriage" under the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, and that excluding same-sex couples from marriage does not constitute irrational or invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. See *id.*, 191 N.W.2d at 186-87. The Minnesota Supreme Court had ruled that the state's definition of marriage "does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution." *Id.* at 187.

Prior to 1988, plaintiffs like those in *Baker* had an automatic right to Supreme Court review "[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution ... of the United States, and the decision is in favor of its validity." 28 U.S.C. § 1257(2). On direct appeal, the Supreme Court "dismissed for want of a substantial federal question." *Baker*, 409 U.S. at 810.

The United States Supreme Court's dismissal of the *Baker* appeal for want of a substantial federal question was a decision on the merits that is binding on all other courts considering the same issues. The Supreme Court in *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) held that

[s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

*Id.* at 176 (1977). However, the Court reiterated its prior holding “that lower courts are bound by summary actions on the merits by this Court,” (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)), and clarified that the precedential value extends to “the precise issues presented and necessarily decided ...” *Mandel*, 432 U.S. at 176.

The Appellants’ Jurisdictional Statement in the *Baker* appeal raised the issues of whether excluding same-sex couples from marriage:

deprives appellants of liberty and property in violation of the due process and equal protection clauses [and] ... constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

APPELLANTS’ JURISDICTIONAL STATEMENT (“APP. JUR. ST.”), at 11, 18 (Feb. 11, 1972). The *Baker* appellants directly raised a (substantive due process) claim of a fundamental right to marry “fully protected by the due process and equal protection clauses of the Fourteenth Amendment.” *Id.* at 11 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*,

262 U.S. 535 (1923)). They claimed that “[t]he discrimination in this case is one of gender.” APP. JUR. ST. at 16 (citing *Reed v. Reed*, 404 U.S. 71 (1971). And they argued that “[b]y not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.” APP. JUR. ST. at 18 (citing *Griswold, Loving, Boddie*, and *Mindel v. United States Civil Svc. Comm’n*, 312 F. Supp. 485 (N.D. Cal. 1970)).

The Supreme Court’s dismissal of the appeal for want of a substantial federal question was a rejection of the merits of all of these claims. There is no right to same-sex “marriage” in the Ninth or Fourteenth Amendments to the U.S. Constitution. Courts are “not free to disregard this pronouncement.” *Hicks*, 422 U.S. at 344; see also *id.* at 344-45 (“lower courts are bound by summary decision by this Court ‘until such time as the Court informs [them] that [they] are not.’”)(quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)).

As the California Supreme Court recently noted in regard to *Baker*, it “is a decision ... binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does *not* violate the federal Constitution’s guarantees of equal protection and due process of law.” *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1126 (2004) (Kennard, J., concurring in part and dissenting in part)

(emphasis in original). Justice Kennard further pointed out that “[u]ntil the United States Supreme Court says otherwise, which it has not yet done, *Baker v. Nelson* defines federal constitutional law on the question whether a state may deny same-sex couples the right to marry.” *Id.* at 1127.

Justice Kennard’s discussion of *Baker* in her *Lockyer* concurrence is consistent with every published decision that has addressed *Baker*’s precedential value,<sup>9</sup> including two very recent decisions in Florida and Indiana. In *Wilson v. Ake*, No. 8:04-cv-1680-T-30, 2005 U.S. Dist. LEXIS 755 (M.D. Fla. Jan. 19, 2005), a same-sex couple seeking recognition of their Massachusetts “marriage” license challenged the state’s refusal to give full faith and credit to their “marriage.” Addressing the plaintiffs’ challenge to the constitutionality of the federal Defense of Marriage Act (28 U.S.C. § 1738C), the court stated:

Although *Baker v. Nelson* is over thirty (30) years old, the decision addressed the same issues presented in this action and this Court is bound to follow the Supreme Court’s decision. \*\*\* The Supreme Court has not explicitly or

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<sup>9</sup> See *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) (“the Supreme Court’s dismissal of the [*Baker*] appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on lower federal courts”); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (Supreme Court’s dismissal of *Baker* appeal was “an important adjudication on the merits”), *aff’d on other grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir.) (noting that the Supreme Court’s dismissal of the *Baker* appeal “operates as a decision on the merits”), *cert. denied*, 458 U.S. 1111 (1982); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. 1993) (dismissal in *Baker* “is a holding that the constitutional challenge was considered and rejected”) (quoting trial court opinion with approval); but see *In re Kandu*, 315 B.R. 123 (W.D. Wash. 2004).

implicitly overturned its holding in *Baker* or provided the lower courts, including this Court, with any reason to believe that the holding is invalid today. Accordingly, *Baker v. Nelson* is binding precedent upon this Court and Plaintiffs' case against Attorney General Ashcroft must be dismissed.

*Wilson*, at 7.

The day after *Wilson* was decided, the Indiana Court of Appeals announced its decision in *Morrison v. Sadler*, No. 49A02-0305-CV-447, 2005 Ind. App. LEXIS 75 (Ind. Ct. App. Jan. 20, 2005). In *Morrison*, several same-sex couples (unsuccessfully) challenged the constitutionality of Indiana's marriage statutes. Although the plaintiffs' challenge raised state constitutional claims only, the court explained the reason why a challenge to Indiana's marriage laws under the *federal* constitution would have been futile: "[t]here is binding United States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution. *Id.* at 5 (citing *Baker v. Nelson*)."<sup>10</sup>

The United States Supreme Court's decision *Baker v. Nelson* has not been overruled. Under this Court's precedent—that the state due

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<sup>10</sup> Although the recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), "represents a significant shift in the high court's view of constitutional protections for same-sex relationships," there have been no U.S. Supreme Court decisions that "undermine the authority of *Baker v. Nelson* to such a degree that a lower federal or state court ... could disregard it." *Lockyer*, 33 Cal. 4th at 1127 (Kennard, J., concurring); see also *Wilson*, *supra*, at 9 ("[t]he Supreme Court's holding in *Lawrence* does not alter the dispositive effect of *Baker*." (citing *Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent."))

process clause does not afford any greater protection to plaintiffs than that afforded under the federal Due Process Clause—*Baker v. Nelson* is binding upon this Court. See *Matteson, supra*, 142 Wn.2d at 309-310 (where state due process clause does not afford greater protection than federal Due Process Clause, applicable Supreme Court decisions interpreting that Clause are binding on this Court). Accordingly, Plaintiffs' due process claim, like its privileges and immunities claim, is without merit.

#### CONCLUSION

The Plaintiffs have asked this Court to declare that the conception of marriage that has informed the understanding and legal enactments not only of this State, but of humankind throughout recorded history, must be redesigned. This, they suggest, is compelled by the state constitution. That such an imaginative proposal is bereft of sound justification should not surprise.

For the foregoing reasons, this Court should deny to Plaintiffs the relief they seek, and reverse the lower courts' misguided imposition on legitimate legislative authority.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Todd M. Nelson", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke.

David R. Langdon  
(OH Bar No. 0067046)  
LANGDON & SHAFER LLC  
11175 Reading Road, Ste. 103  
Cincinnati, Ohio 45241  
Telephone: (513) 733-1038

Todd M. Nelson  
(WA Bar No. 18129)  
600 Stewart Street, Ste. 1920  
Seattle, WA 98101  
Telephone (206) 269-8290

*Attorneys for Amicus Curiae  
Family Research Council*