

Consolidated Nos. 75934-1, 75956-1

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

HEATHER ANDERSEN, *et al.*, Respondents,

v.

KING COUNTY, *et al.*, 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

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IN SUPPORT OF APPELLANTS**

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Interest of the *Amicus*

Amicus curiae is United Families International, a non-sectarian 501(c)(3) public charity based in Gilbert, Arizona. UFI, founded in 1978, seeks to maintain and strengthen the family unit in the United States and other countries by promoting traditional marriage, parental rights, cultural values, the rights of unborn children and national sovereignty. UFI has been granted official consultative status at the United Nations as a non-governmental organization and has participated in population conferences.

Recognizing that the family is the natural and fundamental group unit of society, UFI is committed to supporting those measures that maintain and strengthen the family. Those measures include promoting respect for marriage between man and woman, founded on chastity before marriage and fidelity in marriage; the sanctity of human life, including the unborn; the right and obligation of parents to love, protect, provide for and teach their children; existing laws, political structures and cultural norms that preserve and protect the family; and compassion for the disadvantaged and distressed, including orphans and street children.

A decision requiring Washington to recognize same-sex marriage would irretrievably undermine the institution of marriage and would be harmful to both society in general and children in particular. To assist this Court in addressing the equal rights issue, *amicus* submits this brief.

Introduction

The Washington Defense of Marriage Act (Laws of 1988, ch. 1) defines marriage as “a civil contract between a male and a female,” RCW § 26.040.010(1), and prohibits marriage “when the parties are persons other than a male and a female,” RCW § 26.04.020(1)(c). Respondents challenged the Act on multiple state grounds, including the equal rights amendment, Const. art. XXXI, § 1. *See* Andersen Complaint at 8 (¶ 18d); Castle Complaint at 7 (¶¶ 29-31). Based on the authority of *Singer v. Hara*, 11 Wn.App. 247, 522 P.2d 1187 (1974), *rev. denied*, 84 Wn.2d 1008 (1974), the lower courts declined to rule in favor of respondents on their equal rights claim. *See* Andersen Memorandum Op. at 23; Castle Memorandum Op. at 5-9.¹ The courts, however, did rule in favor of respondents on alternative state grounds. *See* Andersen Memorandum Op. at 22 (Const. art. I, §§ 3, 12); Castle Memorandum Op. at 36 (art. I, § 12). On appeal, respondents have reiterated their equal rights argument in defense of the judgments entered below. *See* Andersen Br. at 36-55; Castle Br. at 68 (adopting Andersen Brief equal rights argument).

¹ In his Memorandum Opinion in *Castle* (at 8), Judge Hicks stated that “the *Singer* case cries out for reexamination by a higher court,” Judge Hicks apparently overlooked the fact that this Court has repeatedly cited *Singer* with approval. *See Guard v. Jackson*, 132 Wn.2d 660, 664, 940 P.2d 642, 644 (1997); *Marchioro v. Chaney*, 90 Wn.2d 298, 307, 582 P.2d 487, 492 (1978), *aff’d*, 442 U.S. 191 (1979); *State v. Wood*, 89 Wn.2d 97, 103, 569 P.2d 1148, 1151 (1977). *Amicus* generally adopts the Attorney General’s Statement of the Case.

ARGUMENT

THE DEFENSE OF MARRIAGE ACT DOES NOT VIOLATE THE STATE EQUAL RIGHTS AMENDMENT.

Article XXXI, § 1, of the Washington Constitution provides:

“Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.” Const. art. XXXI, § 1. Section 2 empowers the legislature to enforce the article by appropriate legislation. Const. art. XXXI, § 2. The amendment was adopted on November 7, 1972.

Amicus submits that nothing in the text, history, purpose or interpretation of the equal rights amendment requires Washington to recognize same-sex marriage in violation of the longstanding public policy of the State, as reflected in the Defense of Marriage Act,² to sanction only opposite-sex marriage. For this Court to decide otherwise would run directly counter to the intent of the Legislature that proposed the amendment and the understanding of the People who voted to adopt it. Moreover, such a decision would stand in stark contrast to the consistent interpretation this Court has given the amendment.

² “Although the Legislature only recently amended the marriage statute to explicitly exclude same-sex marriage, the law has been interpreted that way for many years.” *Vasquez v. Hawthorne*, 99 Wn.App. 363, 368 n.3 994 P.2d 240, 243 n.3 (2000), *vacated and remanded on other grounds*, 145 Wn.2d 103, 33 P.2d 735 (2001), citing *Singer v. Hara*. In other words, the Defense of Marriage Act did not prohibit what had previously been allowed (*i.e.*, same-sex marriage). Rather, it gave explicit meaning to what had always been implicit in the marriage laws of the State.

Text of the Amendment

The equal rights amendment provides, in part, that “Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.” Const. art. XXXI, § 1. The Defense of Marriage Act cannot be said to “deny” or “abridge” “equality of rights . . . under the law” “on account of sex.” The Act, in fact, is gender neutral. Both men and women may marry members of the opposite sex; neither may marry anyone of the same sex.

The difficulty with respondents’ sex discrimination argument, as the Vermont Supreme Court has noted, is that “the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and woman equally from marrying a person of the same sex.” *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999). “[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct.” *Id.*³ Other courts are in accord in rejecting the claim that “defining marriage as the union of one man and one woman discriminates

³ The Vermont Supreme Court’s decision requiring the State to recognize either marriage or its legal equivalent (civil unions) between members of the same sex was based upon a provision in the Vermont Constitution (the “Common Benefits Clause,” VT. CONST. ch. I, art. 7 (2003)) for which there is no analog in the Washington Constitution.

on the basis of sex.” *Id.* citing *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); *Singer v. Hara*, 11 Wn.App. 247, 250-55, 522 P.2d 1187, 1190-92 (1974). *See also Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1983); *Dean v. District of Columbia*, 653 A.2d 307, 363 n.2 (D.C. App. 1995) (“[t]he marriage statute applies equally to men and women”).⁴

Citing *Loving v. Virginia*, 388 U.S. 1 (1967), respondents argue that facial neutrality does not immunize a statute from constitutional challenge, at least where it was enacted with a discriminatory purpose. *See Andersen Br.* at 40-45. Unlike the history of the anti-miscegenation statutes struck down in *Loving*, however, which clearly stigmatized blacks as inferior to whites,⁵ respondents identify nothing in the history of the

⁴ In this Court, respondents rely on *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). *See Andersen Br.* at 39, 40. In *Baehr*, the Hawaii Supreme Court held that a law reserving marriage to members of the opposite sex constitutes sex-based discrimination, subject to a heightened standard of judicial review. *See Baehr*, 852 P.2d at 59-63. A noted constitutional scholar, Bernard Schwartz, has described *Baehr* as “an affront to both law and language that well deserves its place on the list of worst decisions.” Bernard Schwartz, *A BOOK OF LEGAL LISTS* at 182 (Oxford University Press 1997). “The *Baehr* decision is so contrary to both established law and common sense that one is almost speechless before this patent *reductio ad absurdum* of equal protection jurisprudence.” *Id.* at 183.

⁵ The statutes challenged in *Loving* did not prohibit all interracial marriages, but only marriages between “white persons” and “non-white persons.” *Loving*, 388 U.S. at 11 & n.11. Interracial marriages between “non-whites,” *e.g.*, blacks and Asians, were not banned. Thus, unlike the Defense of Marriage Act, the anti-miscegenation statutes struck down in *Loving* did not have a “symmetrical application.” *Andersen Br.* at 45. The statutory treatment of interracial marriages was actually asymmetrical, *i.e.*, some interracial marriages were allowed while others were prohibited. Noting that “Virginia

Defense of Marriage Act suggesting that it was “intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender.” *Lawrence v. State*, 41 S.W.3d 349, 358 (Tex. App. 2001, *writ ref’d*) (*en banc*), *rev’d on other grounds*, *Lawrence v. Texas*, 539 U.S. 558 (2003). Accordingly, the Act cannot be equated in a facile and superficial manner with anti-miscegenation laws. The reservation of marriage to opposite-sex couples does not discriminate on the basis of sex.⁶

History of the Amendment

What effect a general constitutional amendment was intended to have upon a specific legal issue is often shrouded in darkness. The constitutional text itself may be unilluminating and the record of its

prohibits only interracial marriages involving white persons,” the Court determined that “the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” *Id.* That “justification,” the Court concluded, was patently inadequate: “We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” *Id.* at 11-12.

⁶ Not surprisingly, respondents do not argue that the equal rights amendment prohibits discrimination on the basis of sexual orientation, as opposed to sex. In light of the legislative history of the equal rights amendment such an argument would be unavailing. See Senate Journal, Feb. 8, 1972, at 347 (equal rights amendment would not affect the constitutionality of laws relating to homosexuality because the amendment “refers to a person’s sex, not to a person’s sexual activities *or orientation* or interests”) (emphasis added) (remarks of the principal Senate sponsor, Sen. Francis). See also *Miguel v. Guess*, 112 Wn.App. 536, 557, 51 P.3d 89, 99 (2002), *rev. denied*, 148 Wn.2d 1019 (2003) (hospital’s discharge of employee because of her sexual orientation “[did] not violate a clear mandate of public policy in Washington”).

proposal and ratification may shed little or no light on the subject. Fortunately, that is not the case with respect to the impact of the Washington equal rights amendment on the question of same-sex marriage. Remarkably, respondents cite none of this history in their brief.

During the debate over HJR No. 61, Senator Rasmussen asked Senator Francis, the resolution's principal sponsor, whether the proposed amendment would obliterate any distinctions based upon sex and legalize homosexual marriage. Senator Francis replied, in pertinent part:

Now your second, I think the second part of your question is, would this bill legalize homosexual marriage, and I am not opposed to homosexual marriage. I do not see one reason or the other why we have to tell people who they marry or what kinds of private lives they lead. I think that ought to be their business *but I do not see that this gets at that. I do not see that this would get at that at all.*

Id. (emphasis supplied). In other words, the equal rights amendment would *not* require the State of Washington to recognize same-sex marriage.⁷

⁷ As the principal Senate sponsor of the resolution placing the equal rights amendment on the ballot, Sen. Francis' views are entitled to considerable weight. "While statements and opinions of individual legislators are not considered by the courts in construing legislation, statements made in answer to questions on the floor by the chairman of the committee in charge of the bill may be taken as the opinion of the committee as to the meaning of the bill." *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216, 221 (1972). See also *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 49, 785 P.2d 815, 819 (1996) (*same*). Other supporters of HJR 61 echoed these views. On February 8, 1972, Senator Elicker stated, "We don't have homosexual marriages in front of us." Two days later, he reiterated that the issue of homosexual marriage "has absolutely nothing to do with this, with this equal rights amendment," Senator Washington expressed similar views. See remarks of Senators Elicker and Washington, Feb. 8, 10, 1972 (untranscribed audiotape of floor debate on HJR 61). No supporter of HJR 61 in the House or Senate ever said otherwise.

Following the legislature's approval of HJR 61, the Judiciary Committee of the Washington State Legislative Council prepared a 43-page report studying the impact of the equal rights amendment on the laws of the State.⁸ The report, adopted by the Legislative Council and published on October 16, 1972, three weeks before the referendum, listed "hundreds of statutes which would or could violate the language of the Equal Rights Amendment, HJR 61." "The Potential Impact of House Joint Resolution No. 61 – the Equal Rights Amendment – on the Laws of the State of Washington," Washington State Legislative Council, Oct. 16, 1972, at 1.⁹ Noting that "those Washington laws which would be most affected by the adoption of HJR 61 are the sex crimes laws, the domestic relations laws and the labor laws," *id.* at 17, the report identified and discussed almost two dozen statutes affecting domestic relations "which could be rendered defective with the adoption of HJR 61." *Id.* at 19-24. Significantly, the

⁸ Such reports may be considered in determining legislative intent. *See State v. Wilbur*, 110 Wn.2d 16, 19-21, 749 P.2d 1295, 1296-98 (1988). *See also Biggs v. Vail*, 119 Wn.2d 129, 134, 136, 830 P.2d 350, 353 (1992) (final legislative reports).

⁹ The report distinguished between those statutes which *would* violate HJR 61 under any interpretation of the amendment (*see* Legislative Council Report at 5-15) and those which *might* violate HJR 61 under what the report characterized as a literal interpretation (*id.* at 15-17). It must be emphasized that the list of statutes that arguably would be affected by the equal rights amendment was intended to be exhaustive, not merely illustrative. *See* Legislative Council Report, Appendix Note * ("This is an all-inclusive list of those statutes described on Pages 4 through 16 and is intended to be a comprehensive list and brief description of all statutes which would or might be violated by HJR 61").

report did *not* identify any of the laws recognizing marriage as a relationship between one man and one woman¹⁰ as ones that would or could be “rendered defective” with the adoption of the equal rights amendment (all of the domestic relations statutes discussed in the report treated men and women unequally). Obviously, if the Legislative Council had believed that adoption of the equal rights amendment would or even might have required recognition of same-sex marriage, it would have said so in its report.

The Official Voters Pamphlet also sheds light on the understanding of the People who voted to approve the equal rights amendment.¹¹ In the “Statement for” HJR 61, the amendment’s proponents stated that its “Basic Principle” was that “both sexes be treated equally under the law. The State

¹⁰ See, e.g., RCW §§ 26.04.020(1) (West 1961) (prohibiting marriage when either party has a *wife* or *husband* living at the time of such marriage); 26.04.020(3) (West 1961) (prohibiting marriage between a *man* and certain specified *female* relatives or between a *woman* and certain specified *male* relatives); 26.040.070 (West 1961) (form of solemnization of marriage, requiring parties to assent or declare “that they take each other to be *husband and wife*”) (emphasis added); 26.040.140 (West 1961) (“Before any persons can be joined in marriage, they shall procure a license from a county auditor . . . authorizing any person or religious organization or congregation to join together the persons therein names as *husband and wife*”) (emphasis added).

¹¹ In construing a constitutional amendment, a court may consider the explanatory statements and arguments in the official voters pamphlet, as well as the legislative history of the amendment. *City of Tacoma v. Taxpayers of the City of Tacoma*, 108 Wn.2d 679, 687, 743 P.2d 793, 797 (1987), citing *Port of Longview v. Taxpayers of the Port of Longview*, 85 Wn.2d 216, 231-32, 533 P.2d 128, 129 (1979). Indeed, this Court has relied upon the official voters pamphlet in interpreting the equal rights amendment. See *Marchioro v. Chaney*, *supra*, n.1, 90 Wn.2d at 305, 307, 582 P.2d at 491, 492.

could not pass or enforce any laws which places a legal obligation, or confers a special legal privilege on one sex but not the other.” A. Ludlow Kramer, Secretary of State, Official Voters Pamphlet, General Election Tuesday, November 7, 1972, at 52.¹² In describing its effect on state laws, the proponents stated that “Laws which render benefits to one sex could in most cases be retained, and extended to everyone. Laws which restrict and deny rights to one sex would be eliminated.” “Statement for” HJR 61, Official Voters Pamphlet at 52. The Defense of Marriage Act treats both sexes equally because it does not “confer[] a special legal privilege on one sex but not the other,” nor does it “restrict and deny rights to one sex.”

Admittedly, *opponents* of the equal rights amendment claimed that “[h]omosexual and lesbian marriage would be legalized,” “Statement Against” HJR 61, Official Voters Pamphlet at 53, but their views are entitled to little or no weight in determining the understanding of the electorate that approved the amendment. In construing constitutional amendments and statutes adopted by the People in referenda and initiatives, this Court has consistently discounted arguments made by *opponents* of a given ballot issue as set forth in the official voters pamphlet and has relied

¹² The Attorney General’s explanatory comment accompanying the voters pamphlet agreed with this assessment, stating that “state and local government could not treat persons differently because they are of one sex or the other.” Official Voters Pamphlet at 53.

instead upon the arguments made by *proponents* of the measure,¹³ including proponents of the equal rights amendment itself.¹⁴ That is particularly appropriate here where, prior to the November 7, 1972, vote, the Secretary of State issued a statement that an error had been made in the “Statement Against” HJR 61 “regarding the legality of homosexual marriages if HJR 61 were passed.” Madeline Mullen and Pam Cahn, letter to the editor, *Tri-City Herald*, Nov. 5, 1972, at 7.¹⁵ Less than two weeks before the election, Attorney General Slade Gorton rejected arguments that the equal rights amendment would legalize “homosexual marriages.”

¹³ See *Port of Longview*, *supra*, n.11, 85 Wn.2d at 231, 533 P.2d at 129 (citing “the Statement For Senate Joint Resolution 25” contained in the voters pamphlet); *Lynch v. Dep’t of Labor & Industries*, 19 Wn.2d 802, 811-13, 145 P.2d 265, 269-70 (1944) (where the voters of the State were officially advised by the proponents of a referendum measure that it did not have a retroactive effect, and the measure was approved at the general election at which it was submitted to the People, it would be presumed that the voters relied upon the information thus given to them, and not upon information given to them by the measure’s opponents); *State v. Green*, 91 Wn.2d 431, 439, 588 P.2d 1370, 1375 (1979) (“statement in favor of [an] initiative” set forth in the official voters pamphlet “may be considered in determining the purpose and effect of [the] initiative”); *Denny v. Wooster*, 175 Wn. 272, 279, 27 P.2d 328, 331 (1933) (relying upon “common understanding of the purpose of the law, according to arguments supporting that view submitted by authority of law at the time the act was submitted to the people for their support at the general election”).

¹⁴ See *Marchioro v. Chaney*, *supra*, n.1, 90 Wn.2d at 305, 582 P.2d at 491 (citing “Official Voters Pamphlet, November 7, 1972, House Joint Resolution 61, at 52-53, especially ‘Statement for’ at page 52”) (emphasis added).

¹⁵ Only two days before the referendum, a consortium of ERA supporters took out paid newspaper advertisements expressly denying that the amendment would allow homosexual marriage, citing the Secretary of State’s disavowal of such representations in the “Statement Against” in the Official Voters Pamphlet. See, e.g., “State and Local Endorsements for HJR 61,” *Tri-City Herald*, Nov. 5, 1972, at 40.

“I do not believe it will allow homosexual marriages,” the state’s attorney general said. “There are good arguments on both sides of the question, but that is not one of them.”

“Gorton Scans Equal Rights Proposal,” *The (Spokane) Spokesman-Review*, Oct. 19, 1972, at 15.

Contemporary newspaper coverage of the proposed equal rights amendment is also illuminating on what the citizens of Washington understood would be the impact of the amendment. On October 18, 1972, the *Seattle Post-Intelligencer* published an article on the 43-page report the Legislative Council had published on October 16, 1972, discussing the likely and possible impact of the equal rights amendment. See “Passage of HJR 61 Would Change 130 Laws,” *Seattle Post-Intelligencer*, Oct. 18, 1972, A-9.¹⁶ Although, as previously noted, the report indicated that the amendment would potentially affect hundreds of laws (all of which were identified), there was no mention in either the report itself or the article summarizing it that the understanding of marriage as a relationship between one man and one woman would be affected. Barely one week before the election, the *Post-Intelligencer* ran a longer article devoted to the arguments for and against HJR 61. “Equal Rights Amendment—HJR

¹⁶ A virtually identical article (based upon the same UPI story) appeared the same day in the *Seattle Times*. See “Approval of equal rights for women would change 130 laws,” *Seattle Times*, Oct. 18, 1971, A-6.

61—An Emotional Issue for All,” *Seattle Post-Intelligencer*, Oct. 30, 1972, A-4. Significantly, supporters of the proposed amendment said that the amendment “would benefit both sexes” and would have “no effect on such things as homosexual marriage *since laws against men or women marrying each other are not discriminatory on the basis of sex.*” *Id.* (emphasis added) Alluding to the Legislative Council’s report, the article stated that “Laws which penalize or give ‘special privileges’ to one sex but not the other could either be nullified or extended.” *Id.* Of course, laws reserving marriage to opposite-sex couples and prohibiting same-sex marriage do not penalize or reward either sex. Neither men nor women may marry anyone of the same sex; both may marry someone of the opposite sex.

In a special Sunday supplement published only two days before the election, the following statements appeared in an article describing HJR 61:

Opponents argue that passage [of HJR 61] would legalize homosexual marriage, deny preferential treatment to women in divorce settlements, make women eligible for Army combat duty, allow coed sports wrestling in schools, and eliminate preferential auto, health and life insurance rates for women.

Proponents describe the foes’ contentions as emotional, irresponsible fantasies, misleading and incorrect. HJR 61 would have none of the [e]ffects listed above, they say.

“Equal Rights for Women in HJR 61,” *Seattle Post-Intelligencer*, Nov. 5,

1972, Election Preview at 10. On the same day, the *Post-Intelligencer* endorsed HJR 61 stating, in part, that the amendment “would end discrimination based on sex,” and that “[l]aws benefitting one sex would be extended to both sexes.” “About the Issues,” *Seattle Post-Intelligencer*, Nov. 5, 1972, A-11.

Articles and editorials in other newspapers support the conclusion that the equal rights amendment was not intended to mandate state recognition of same-sex marriage. Three weeks before the referendum, two writers for the *Seattle Times* noted that the amendment “doesn’t say anything about integrated athletic teams, integrated restrooms, *homosexual marriages*, pregnancy leaves, widows’ pensions or who has to wash the dishes.” Marcia Schultz and Dale Douglas Mills, “‘Decision Day’ nears on equal rights question,” *Seattle Times*, Oct. 15, 1972, G-1 (emphasis added). “What [the amendment] does do,” the writers continued, “is provide a framework for future court decisions and legislative actions on laws involving special treatment for men or women.” *Id.* Once again, the marriage laws do not accord “special treatment” for either men or women, neither of whom may marry anyone of the same sex.

Betty Fletcher, a supporter of HJR 61 (and later a judge of the Ninth Circuit Court of Appeals) rejected the notion that the amendment

would legalize “homosexual marriages.” “Men, women treatment same in equal rights proposal,” *Tri-City Herald*, Oct. 17, 1972, at 8. Ms. Fletcher “labeled the ‘spectre of homosexual marriage’ as ‘another irresponsible fantasy.’ Marriage laws would be unaffected, she said.” *Id.*¹⁷

In an editorial endorsing the equal rights amendment, the *Seattle Times* identified the amendment’s “principal objective” as “the abolition of those legal barriers that foster sex discrimination and that prevent women from becoming equal partners in society.” “Parity between the sexes,” *Seattle Times*, Oct. 24, 1972, A-12. *Id.* Laws that “confer special protections and benefits” to one sex “could be extended to all, regardless of sex.” *Id.* Of course, laws reserving marriage to opposite-sex couples and prohibiting same-sex marriage do not confer “special protections and benefits” on either sex. In its penultimate paragraph endorsing the equal rights amendment, the editorial stated: “The point, after all, is not to bestow special distinctions, but to recognize that no one should possess more legal rights than another merely by reason of gender.” *Id.* The marriage laws of the State do not “bestow special distinctions” upon either men or women because neither may marry anyone of the same sex.

¹⁷ A similar story containing the same quote from Ms. Fletcher appeared in other Washington papers. See “Proposed Equal Rights Amendment Calls For laws to Treat Men, Women Equally,” *Walla Walla Union-Bulletin*, Oct. 17, 1972, at 7; “Will HJR 61 Take Away Privileges Or Grant True Legal Equity?,” *Daily Olympian*, Oct. 17, 1972, at 9.

Some opponents of HJR 61 claimed that the amendment would legalize homosexual marriages. See “Group Opposes Rights Proposal,” *Spokesman-Review*, Oct. 19, 1972, at 23; “Rights and Responsibilities,” *Spokesman-Review*, Oct. 24, 1972, at 4. But in endorsing the amendment, the *Spokesman-Review* debunked such claims:

It seems to us that some of the arguments used against HJR 61 are at best, specious. The suggestion that homosexual marriages would be permitted seems wholly wrong. Under present laws there are occasional reports of such things. Nothing we can see in the proposed amendment would bear on that question.

“Vote Equal Rights,” *Spokesman-Review*, Oct. 21, 1972, at 4. The *Tri-City Herald* also rejected such claims in its editorial endorsing HJR 61. See “Equal rights inevitable,” *Tri-City Herald*, Oct. 31, 1972, at 6 (HJR would not require recognition of “lesbian or homosexual marriages”).

In sum, supporters of the equal rights amendment, including all of the leading newspapers in the State, as well as the Attorney General and the Secretary of State, expressly and unequivocally denied that the amendment would require the State to recognize same-sex marriage. That understanding, and not that of the opponents of the amendment, should be attributed to the People who voted to adopt the amendment.¹⁸

¹⁸ See n.13, *supra*. See also *State of Washington ex rel. Public Utility District No. 1 of Skagit County v. Wylie*, 28 Wn.2d 113, 130, 182 P.2d 706, 715-16 (1947) (“We are here confronted with a problem of basic powers [of a public utility district] on which

Purpose of the Amendment

In addition to the text and history of the equal rights amendment, this Court's case law confirms that the amendment was directed at those laws that "place[] a legal obligation, or confer[] a special legal privilege on one sex but not the other." Official Voters Pamphlet, "Statement for," at 52. In *Marchioro v. Chaney*, *supra*, n.1, the court explained that [t]he thrust of the equal rights amendment . . . is to end special treatment for or discrimination against either sex." 90 Wn.2d at 305, 582 P.2d at 491.¹⁹ Statutes that reserve marriage to opposite-sex couples and prohibit same-sex marriage, however, do not accord "special treatment for or discriminat[e] against either sex." Both men and women may marry someone of the opposite sex; neither may marry anyone of the same sex.

Interpretation of the Amendment

Finally, this Court's interpretation of the equal rights amendment

the opponents and proponents were in marked disagreement. The proponents prevailed in the election, and, while no one can say why the people voted in a certain way on a certain measure, *the argument is persuasive, if not conclusive, that the majority of the people had adopted the argument of the prevailing side*") (emphasis added).

¹⁹ This is consistent with the interpretation equal rights provisions have been given in other States. Speaking of such provisions generally, the Maryland Court of Appeals has noted that "[t]he cases concerning equal rights amendments share a common thread: they generally invalidate governmental action which imposes a burden on one sex but not the other, or grants a benefit to one but not the other." *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 812, 825 (Md. 1985) (plurality opinion). See generally Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 961-62 (Fall 2002).

leaves no doubt that the Defense of Marriage Act passes constitutional muster. “Under the equal rights amendment, the equal protection/suspect classification test is replaced by the single criterion: Is the classification by sex discriminatory? Or, in the language of the amendment, Has equality been denied or abridged on account of sex?” *Marchioro*, 90 Wn.2d at 305, 582 P.2d at 305. *See also Darrin v. Gould*, 85 Wn.2d 859, 877, 540 P.2d 882, 893 (1975) (“under our ERA *discrimination* on account of sex is forbidden”) (emphasis added). The amendment does not permit “exclusionary statutes which apply to one sex only” *Marchioro*, 90 Wn.2d at 307, 582 P.2d at 492. The Defense of Marriage Act, however, applies to both sexes equally. Both men and women may marry someone of the opposite sex; neither may marry anyone of the same sex. There clearly is “no abridgment or denial on account of sex of any equality of rights under the law” where the sexes are treated equally. *Id.* at 306, 582 P.2d at 492.²⁰

²⁰ In each case where this Court or the Court of Appeals has found a violation of the equal rights amendment, the statute, ordinance, common law rule or practice in question has discriminated against one sex in favor of the other. *See Guard v. Jackson*, *supra*, n.1, 132 Wn.2d at 661-67, 940 P.2d at 642-45 (striking down statute requiring father to have contributed regularly to the financial support of a child born out of wedlock before he could join in wrongful death action following the death of the child, without placing the same contribution requirement on the mother); *Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 96, 614 P.2d 1272, 1275 (1980) (allowing wives, as well as husbands, to recover damages for loss of consortium in common law negligence action); *Darrin v. Gould*, *supra*, 85 Wn.2d at 871-78, 540 P.2d at 889-93 (high school athletic association regulations prohibiting girls from participating in interscholastic

A party claiming that a statute violates the equal rights amendment has the burden of showing that the statute has an unequal effect on one sex as a class. *State v. Brayman*, 110 Wn. 183, 203-04, 751 P.2d 294, 305 (1988). *See also State v. Wood*, *supra*, n.1, 89 Wn.2d at 103, 569 P.2d at 1151 (“One acquires no protection [under the equal rights amendment] unless it is first demonstrated that either a right or responsibility has been denied or abridged on account of that person’s sex”) (citing *Singer v. Hara*). Respondents have not (and cannot) meet their burden in this case because the Defense of Marriage Act does not have an “unequal effect” on either sex. *See Marchioro v. Chaney*, *supra*, n.1, 90 Wn.2d at 307, 582 P.2d at 492 (“while there is certainly a classification, there is equality of treatment and this is sufficient to meet the requirements of the equal rights amendment) (citing *Singer*). Accordingly, their equal rights argument should be rejected.²¹

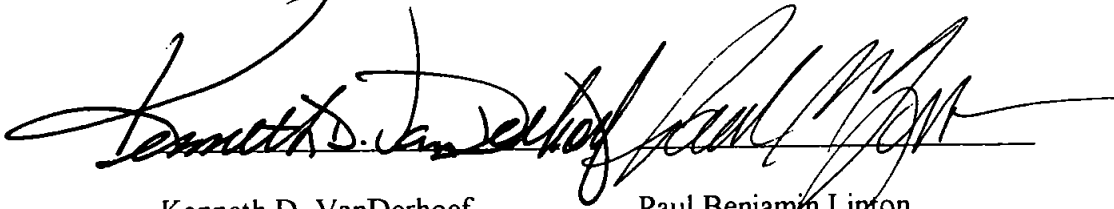
contact football on boys’ teams violated the equal rights amendment, particularly “when the school provides no corresponding girls’ football team, on which girls may participate as players”), *but see* RCW 28A:640.020(1)(c) (authorizing public schools to provide “separate teams for each sex”); *State v. Burch*, 65 Wn.App. 828, 836-37, 830 P.2d 357, 362-63 (1992) (equal rights amendment prohibits gender-based peremptory challenges); *Maxwell v. Dep’t of Social & Health Services*, 30 Wn.App. 591, 594, 636 P.2d 1101, 1104 (1981) (invalidating state welfare regulations limiting benefits to families of unemployed fathers); *In re Marriage of Murray*, 28 Wn.App. 187, 190-91, 622 P.2d 1288, 1290-91 (1981) (suggesting that the equal rights amendment had abrogated the “tender years doctrine” favoring mothers in child custody disputes involving young children).

²¹ With respect to the issues not covered by this brief, *amicus* generally adopts the arguments of the intervenors, the State of Washington and King County.

CONCLUSION

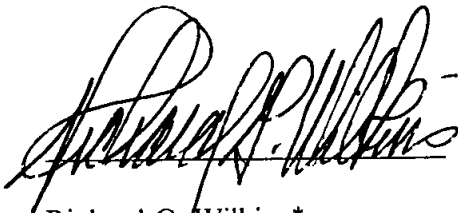
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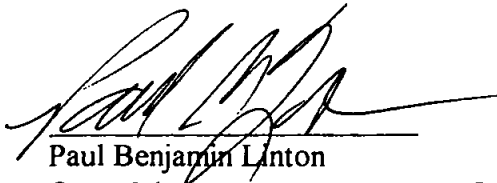
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