

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

CELIA CASTLE and BRENDA BAUER *et al.*, Respondents,

v.

STATE OF WASHINGTON, Appellant.

Appeal from the Superior Court of Thurston County  
The Honorable Richard D. Hicks

**BRIEF OF AMICI CURIAE PRIDE**

**FOUNDATION; SEATTLE MEN'S CHORUS/SEATTLE WOMEN'S CHORUS;  
SEAMEC; TACOMA UNITED FOR FAIRNESS; EQUAL RIGHTS WASHINGTON;  
INLAND NORTHWEST EQUALITY; OUTKITSAP; SPOKAME AIDS NETWORK;  
ENTRE HERMANOS, AND THE DESERT OASIS WEBSITE COMMITTEE**

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AIDS Network; Trikone-  
Northwest; Entre Hermanos;  
and The Desert Oasis Website  
Committee

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Article I, § 12 of the Washington Constitution forbids the State from “granting to any citizen [or] class of citizens ... privileges or immunities which upon the same terms shall not equally belong to all citizens.” The couples in these cases challenge their exclusion from civil marriage.

Judges Downing and Judge Hicks agree that the marriage exclusion violates the fundamental equality guarantee of the Privileges and Immunities Clause under either strict scrutiny or rational basis review. As discussed below in Section I, *amici* urge this Court to apply strict scrutiny to Respondents’ Article 1, Section 12 claims. The “inferior legal status” of Washington’s lesbian and gay citizens is constitutionally suspect under fundamental equality principles recognized by this Court. *Hanson v. Hutt*, 83 Wn.2d 195, 199 (1974).

Moreover, as discussed below in Section II, the result would also be the same under a rational basis review. Washington citizens include thousands of same-sex couples who share their lives together in the same ways and for the same reasons that different-sex couples marry. Because there is no reasonable ground for the State to treat these similarly situated persons differently, the marriage exclusion violates Article 1, Section 12’s equality guaranty.

*I. The Exclusion of Same-Sex Couples from Civil Marriage Cannot Survive the Strict Scrutiny that is Required By the Equality Guarantee of the Privileges and Immunities Clause of the Washington Constitution.*

*A. Washington Courts May Incorporate Useful Federal Doctrine, But Are Not Limited By Federal Precedent For Interpretation Of State Constitutional Provisions.*

Appellants suggest Judges Downing and Hicks erred by not waiting for a federal court to do their work for them and find a federal equal protection violation. Appellants either misunderstand or misstate both the *Andersen* and *Castle* complaints, both of which were based only on the Washington Constitution, with no federal constitutional claims. And appellants ignore fundamental principles of state sovereignty and state constitutional analysis.<sup>1</sup>

Underlying both Washington's Privileges and Immunities Clause and the federal equal protection clause is equal treatment under the law:

The aim and purpose of the special privileges and immunities provision of Art. I, § 12, of the state constitution and of the equal protection clause of the fourteenth amendment of the Federal constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other."

*State ex rel. Bacich v. Huse*, 187 Wash. 75, 83-84, 59 P.

2d 1101 (1936), *overruled on other grounds*, *Puget Sound*

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<sup>1</sup> "State constitutions were originally intended to be the primary devices to protect individual rights, with the federal constitution a secondary layer of protection." *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring). See also *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (even in cases that raise both state and federal constitutional claims, considering the federal constitution first is considered premature; Washington courts are required to "first interpret the Washington Constitution to develop a body of independent jurisprudence....")

*Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 949, 603 P.2d 819 (1979).

Further, "Equal protection of the laws under state and federal constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978).

Washington courts march to their own drummer. They need not wait for the United States Supreme Court to declare a classification to be suspect, or a right to be important, before applying a degree of heightened scrutiny. *O'Day v. King County*, 109 Wn.2d 796, 151, 749 P.2d 142 (1988) ("Our determination of whether a class is inherently suspect in the state of Washington or whether a fundamental right explicitly or implicitly guaranteed by the Washington Constitution has been affected may differ from Supreme Court conclusions"). When independently convinced that doing so is warranted, this Court has not hesitated to exceed federal precedent to ensure that similarly situated Washington citizens are receiving like treatment under the law<sup>2</sup>.

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<sup>2</sup> See, e.g., *State v. Phelan*, 100 Wn.2d 508, 513-14, 671 P.2d 1212 (1983) (extending reasoning from *Plyler v. Doe*, 457 U.S. 202 (1982) to apply intermediate scrutiny to a classification based solely on wealth although such classifications had not received similar scrutiny under federal equal protection cases); *In re Mota*, 114 Wn.2d 465, 473-74, 788 P.2d 538 (1990) (declining to follow *McGinnis v. Royster*, 410 U.S. 263 (1973), holding that rational review analysis used there did not control since Washington applies heightened level of scrutiny due to indigence; *Darrin v. Gould*, 85 Wn.2d 859, 868, 540 P.2d 882 (1975); see also *Griffin v. Eller*, 130 Wn.2d 58, 65, 922 P.2d 788 (1996) (extent to which the constitutional guaranties found in Art. I, § 12 exceed those available under the federal equal protection clause remains an open question).

A. *Core Equality Principles Require Heightened Scrutiny of the Heterosexuals-Only Marriage Rule.*

(1) *Washington's test for identifying "suspect" classifications.*

Washington has its own test for ascertaining when more careful judicial review of a legislative classification is warranted.

*State v. Smith*, 117 Wn.2d 263, 277-78 (1991) (describing Washington's three-tier test as resembling the federal analysis, but using a different formulation of intermediate scrutiny). *See also Sigler v. Sigler*, 85 Wn. App. 329, 333-36 (1997).

This Court has incorporated elements from decisions of other states and the United States Supreme Court for its test of which classifications should be considered suspect, semi-suspect, or not *per se* suspect. In the closest parallel to the present case, the Court drew liberally upon principles developed by both the United States Supreme Court and the California Supreme Court, and determined that classifications based on sex deserve the most rigorous review. *See Hanson v. Hutt*, 83 Wn.2d at 199 (1974) (holding that sex-based classifications are inherently suspect and

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Washington's independent approach contrasts with states that strictly adhere to federal precedents without analysis of their underlying reasoning. *See, e.g. White v. Hughes*, 257 Ark. 627, 629, 519 S.W.2d 70, 71 (1975) ("[W]e take the view that if the rule of . . . the highest authority on the equal protection clause 'is to be changed . . . we shall await the views of the United States Supreme Court....'"

must be subject to strict judicial scrutiny) (quoting *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 18-20, 485 P.2d 529, 540 (1971))<sup>3</sup>.

The analysis adopted in *Hanson* centers on whether “outdated social stereotypes” are being used to relegate a whole class to “an inferior legal status without regard to the capabilities or characteristics of its individual members.” 83 Wn.2d at 199.<sup>4</sup> *Sail'er Inn*, on which the *Hanson* court relied, also focused on whether members of the disadvantaged group have suffered longstanding, entrenched discrimination, as such history can signal that prejudice rather than a legitimate distinction between groups

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<sup>3</sup> Washington courts have not yet determined whether sexual orientation is a suspect classification. *See, e.g., Miguel v. Guess*, 112 Wn. App. 536, 552 n.3, 51 P.3d 89 (2002) (declining to reach heightened scrutiny question because the sexual orientation based employment discrimination at issue was not justifiable even under the rational relationship test). But, as discussed below, established Washington precedent leads easily to the conclusion that such classifications should be scrutinized with the most exacting review.

<sup>4</sup> The *Hanson* Court adopted for Washington the following reasoning:  
What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.  
*Id.* at 199, quoting *Sail'er Inn v. Kirby*, 5 Cal. 3d at 18-20.

may have motivated a particular legislative classification. 5 Cal.3d at 19.<sup>5</sup>

A third key factor is whether there is reason to believe that improper treatment of a particular group will go unremedied in the political process because the group's members are "underrepresented in federal and state legislative bodies and in political party leadership." *Sail'er Inn*, 5 Cal.3d at 19 n.17.

Over the years, this Court has borrowed from federal decisions that employ these same factors to assess potential equal protection problems. Thus, for example, in rejecting a defendant's suggestion that age should be deemed "suspect" and that laws burdening juveniles deserve heightened scrutiny, this Court adopted the analysis used by the U.S. Supreme Court in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982). *Washington v. Schaaf*, 109 Wn.2d 1, 17-19 (1987).

In *Schaaf*, this Court adopted Justice Thurgood Marshall's formulation that, although "[n]o single talisman can define those groups likely to be the target of classifications offensive to the

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<sup>5</sup> In the words of the California court: "underlying all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. ... They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property ...." *Sail'er Inn*, 5 Cal.3d at 19.

Fourteenth Amendment and therefore warranting heightened or strict scrutiny,” consideration should be given to whether the disadvantaged group is targeted by prejudice and is disadvantaged in the political process.” *Id.*, at 18-19. See also *Michel v. Richland*, 89 Wn.App. 764, 772 (1998) (rejecting claim that alcoholics constitute a suspect class, and noting the lack of any history of “invidious discrimination” against them); *Nielsen v. Washington State Bar Association*, 90 Wn.2d 818, 823-24 (1978) (confirming that rule disqualifying resident aliens from taking the bar examination deserved strict scrutiny due to the history of irrational discrimination against this group, and the fact that “citizenship is not closely related to many of life’s pursuits.”).<sup>6</sup>

(2) *As Washington’s neighboring jurisdictions have found, sexual orientation discrimination warrants heightened judicial scrutiny.*

Washington’s courts “may look to” Oregon’s well-developed body of case law analyzing its privileges or immunities clause. *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn.2d 791, 805, 811, 83 P.2d 419 (2004) (*Grant County II*), at 426; and Judge Hicks found the reasoning of *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502 (1998), persuasive that

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<sup>6</sup> *Nielsen* at 823: “Clearly, the right to be free of discrimination – at least in the absence of a compelling state interest – is basic in our society.” *Nielsen* at 824: “no question is raised as to petitioner’s good character or general fitness.”

sexual orientation classifications should be considered suspect under Washington's constitution as well.

To invoke the protection of Oregon's Privileges and Immunities Clause, plaintiffs must show that they are members of a "true" class of citizens, that the statute at issue discriminates against the class on the basis of the characteristics of that class, and that the discrimination is not justifiable. See *State v. Clark*, 291 Or. 231, 240 (1981); *Jungen v. State*, 94 Or. App. 101, 105 (1988). A "true" class does not exist solely as a result of legislation, but must exist and be determined outside of the law. *Tanner*, 157 Or. App. at 502.

Much like Washington's approach, the Oregon test recognizes as "suspect" those classifications that employ irrelevant personal characteristics that have been "historically regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Id.* Sexual orientation classifications are "suspect" under this analysis because lesbians and gay men constitute a "distinct class" that has been and will continue to be "the subject of adverse stereotyping and abuse." *Tanner*, 971 P.2d at 447.<sup>7</sup>

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<sup>7</sup> In *Tanner*, the court found an unconstitutional denial of equal privileges and immunities where the state was providing insurance benefits for the dependent family members of its married heterosexual employees, but not for the long-term domestic partners of its lesbian and gay employees. The benefits classification was facially neutral as to sexual orientation (married employees were eligible for dependent coverage, unmarried employees were not) and the State of Oregon argued that it was permitted to treat married and unmarried

California courts have responded to group-based discrimination against lesbians and gay men with great skepticism. The California Supreme Court first addressed the unconstitutionality of state-sponsored exclusion of gay people a quarter century ago, during the period when it also framed the sex discrimination analysis that Washington adopted prior to enactment of our Equal Rights Amendment<sup>8</sup>. See *Hanson*, 83 Wn.2d at 201.

Holding that the state equality guarantee forbids barring lesbians and gay men as a class from public employment, the California high court observed that “[t]he aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.” *Gay Law Students v. Pacific Tel. & Tel*, 24 Cal.3d 458, 474-75 (1979). Since then, California’s intermediate courts have made explicit that sexual orientation classifications are suspect and require rigorous review. See, e.g., *Children’s Hospital and Medical Center v. Belshe*, 97 Cal. App. 4th 740, 769 (2003) (identifying race and sexual orientation as examples of suspect classifications under the California Constitution); see generally

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employees differently. But the *Tanner* court held “that reasoning misses the point... homosexual couples may not marry and thus the benefits are not available to them.” *Id.*

<sup>8</sup> Washington Constitution, Art. XXXI.

*People v. Garcia*, 77 Cal. App. 4th 1269 (2000) (holding that excluding lesbians and gay men from juries based on their sexual orientation violates the California Constitution and discussing elements of strict scrutiny review)<sup>9</sup>.

(3) *Classifications that exclude lesbians and gay men as a group should be recognized as "suspect."*

Whether under Washington's standard formulation of strict scrutiny analysis or Oregon's more streamlined test, exclusions based on sexual orientation satisfy all the elements of these tests and deserve the greatest skepticism.

a. *Lesbians and gay men have been the targets of irrational prejudice.*

Justice William Brennan did not exaggerate when he wrote, "[o]utside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' and such 'immediate and severe opprobrium' as homosexuals."<sup>10</sup> As

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<sup>9</sup> These views are not exclusively a West Coast development, although the trend-setting courts are Washington's neighbors. See also *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 32-38 (D.C. App. Ct. 1987) (finding that government has a compelling interest in eradicating sexual orientation discrimination, and discussing application to sexual orientation classification of Supreme Court's analysis for when to apply strict or heightened scrutiny). See also *Baker v. State*, 170 Vt. at 194, in which the concurring opinion found *Tanner's* "general framework" to be persuasive and consistent with the fuller commitment to equality of the state's citizens found in the Vermont Constitution. 170 Vt. at 234-35.

<sup>10</sup> *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of *certiorari*). See also David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays & Lesbians in the Federal Government* (University of Chicago Press, 2004). In 1950 North Carolina Senator Clyde R. Hoey chaired a secret U.S. Senate committee investigating homosexuals in the federal government, the erroneous and biased report of which set U.S. government policy for the next quarter century. "The man charged with conducting the first full-scale congressional investigation into homosexuality

elsewhere in the United States, lesbians and gay men in Washington are subject to adverse social and political stereotyping and prejudice.<sup>11</sup> Employment and residential discrimination based on sexual orientation continues to be a serious problem, *see, e.g. Miguel, supra*, 112 Wn. App. 536, but in most areas of the state, gay people have no recourse against such discrimination.<sup>12</sup> In

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was completely unfamiliar with the topic.” Johnson, at 102-03. Senator Margaret Chase Smith of Maine wondered, in two hearings, “You mean they are not weaker in mind than any other group?” and, “There is no quick test like an X-ray that discloses these things?” Johnson, at 113-14.

<sup>11</sup> Washington does not include sexual orientation in its Law Against Discrimination, RCW 49.60.030, due to sustained hostility to the idea of protecting gay people from discrimination. *See, for example*, Rebecca Cook, “Supporters, Opponents of Gay Rights Spar At Hearing,” *The Seattle Post-Intelligencer*, February 1, 2005 (“Supporters of gay rights have tried and failed for nearly 30 years to get a law in Washington banning discrimination against gays and lesbians...Ken Hutcherson, pastor of Antioch Bible Church in Redmond, said as a black man he was ‘really upset and appalled’ that sexual orientation might be added to an anti-discrimination law, because he did not believe gays and lesbians have suffered the prejudice African-Americans have.”)

*See also* Gary L. Atkins: *Gay Seattle: Stories of Exile and Belonging* (University of Washington Press (2003), Dale E. Soden, *The Reverend Mark Matthews: An Activist in a Progressive Era* (University of Washington Press, 2001); and Peter Boag, *Same-Sex Affairs: Constructing and Controlling Homosexuality in the Pacific Northwest* (University of California Press, Berkeley, 2003). The authors describe how homosexuality before the 1890s was considered a practice of the transient, lower-class male populations working on railroads, farms and extractive industries. As a more middle-class and professional community of homosexuals was discovered in the early 20<sup>th</sup> century, morality campaigns arose leading to legislation defining homosexuality as a criminal deviance. As Lawrence Lipin commented, reviewing Boag in *Oregon Historical Quarterly* (Vol. 105, No. 2, Summer 2004, at 323), “Homosexuality came to be understood as the chief threat to local families, and it became a compelling interest of the state to protect society from gay men. In the immediate aftermath of the scandals, previously defeated eugenicist sterilization legislation was passed, and the successful bill deviated from its failed predecessors by adding “sexual perverts” to the list of those eligible for the state-mandated procedure. While this all began with the exposure of middle-class homosexuality to public scrutiny, this and other laws would bear most harshly on those transients who were now increasingly understood to be homosexual.” Atkins describes how Seattle police were extracting protection money from gay bars into the 1970s.

<sup>12</sup> Dozens of studies over the past twenty years have confirmed the widespread nature of employment discrimination against lesbians and gay men.

addition, gay people face disproportionate levels of violence and harassment, both nationally and in Washington.<sup>13</sup>

But anti-gay bias is not merely a matter of history and random, anonymous crime. The copious, overt expressions of anti-gay animus in DOMA's legislative record show that prejudice remains pervasive and unapologetic in our state. Plaintiffs' brief in *Castle* quotes legislative session debates on the state Defense of

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See, e.g., American Psychological Association, *Examining the Employment Nondiscrimination Act (ENDA): The Scientist's Perspective* at p. 5 of 9, posted at <http://www.apa.org/pi/lgbcc/publications/enda.html?CFID=2528744&CFTOKEN=6672615> (reporting that up to 44% of gay and lesbian workers had experienced discrimination at some point in their careers; and that gay and bisexual men earned 27% less than their heterosexual male counterparts); M.V. Lee Badgett, Ph.D., *Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination in the Workplace*, 2 *Angles* 1 (Sept. 1997), available at [http://www.iglss.org/media/files/angles\\_21.pdf](http://www.iglss.org/media/files/angles_21.pdf). As one leading expert has phrased it: "Job discrimination continues to pose one of the gravest civil rights threats in the lives of lesbian and gay citizens." John C. Gonsiorek, *Threat, Stress, and Adjustment: Mental Health and the Workplace for Gay and Lesbian Individuals*, in *Homosexual Issues in the Workplace* 243, 244-45 (Louis Diamant ed., 1993). Yet, like the lack of protection at the state level, gay people also receive no federal-level protection against discrimination in employment.

<sup>13</sup> Anti-gay hate crimes have been a persistent problem in Washington. In 2004 three men were charged with first-degree assault and malicious harassment after they beat a man coming out of a gay bar, then slashed him with a broken bottle. "Third suspect charged in Seattle attack on gay man," *The Seattle Post-Intelligencer*, July 21, 2004. See also Linda Keene, "Hate Crimes On Rise In NW – Homosexuals, Racial Minorities Are Targets," *The Seattle Times*, p. B1, June 8, 1990. The Seattle Police Department identified 91 episodes of antigay harassment in 1991 ("Attack Galvanizes Gay Community," *The Seattle Post-Intelligencer*, July 10, 2004).

Even in the most tolerant areas, gay people can be vulnerable if identified. A 1984 survey of Seattle residents found that 21% of gay men and 12% of lesbians had been physically attacked due to their sexual orientation. Barbara Laker, "Attacks on Homosexuals Spur 'Hate-Crime' Conference," *The Seattle Post-Intelligencer*, p. C7, Jan. 25, 1990.

According to the FBI, "Hate Crimes Statistics 2002," 37 anti-gay hate crimes were reported in Washington in 2002. See <http://www.fbi.gov/ucr/hatecrime2002.pdf>, at pp. 53-54. See generally Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 *Am. Psychologist* 948 (1989) (reporting that 92% of lesbians and gay men have been targets of anti-gay verbal abuse or threats and as many as 24% have been victims of physical attacks because of their sexual orientation).

Marriage Act in which lawmakers argued gay people are “not normal,” and one said he thought “we should take homosexuals and put them on a boat and ship them out of the country.” *Castle*, Plaintiffs’ Brief, at pp. 29-31. Such bias makes all too clear why the courts have a duty to review anti-gay exclusions with particular suspicion.

*b. Sexual orientation is irrelevant to the government, but central to identity and not readily changed.*

Appellants’ principal objection below to recognizing anti-gay classifications as “suspect” was their claim that sexual orientation is “mutable,” and their reliance mainly upon the Ninth Circuit’s “finding” of nearly fifteen years ago that sexual orientation is “behavioral” rather than innate and resistant to change. *High Tech Gays v. Def. Indus. Security Clearance Office*, 895 F.2d 563, 573-74 (9<sup>th</sup> Cir. 1990).<sup>14</sup> The Intervenor’s contend further that a relevant dispute exists among the experts about whether or not sexual orientation is readily changeable through medical intervention or “therapy.” [Intervenor’s Superior Court Brief at 24]. These arguments fail for multiple reasons.

First, as explained in *Hanson* and *Tanner*, the key question is not whether the distinguishing trait is changeable or concealable, but rather whether it “bears no relation to ability to perform or

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<sup>14</sup> *But see High Tech Gays*, 909 F.2d 375 (Canby, J., dissenting from denial of rehearing en banc; Norris, J., joining).

contribute to society . . . [so] that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members.” *Hanson*, 83 Wn.2d at 199; see also *Tanner*, 157 Or. App. at 502; *Watkins v. U.S. Army*, 847 F.2d 1329 (9<sup>th</sup> Cir.1988), *aff’d on different grounds*, 875 F.2d 699, 724-25 (9<sup>th</sup> Cir. 1989) (en banc) (Norris, J., concurring) (sexual orientation is sufficiently unrelated to “ability to perform or contribute to society” that disfavored treatment on that basis is “grossly unfair” and “invidious.”); *Cleburne*, 473 U.S. at 440-41.<sup>15</sup>

Second, whether or not laws drawn using particular traits require a closer look for equal protection purposes is not primarily a function of whether the traits are changeable, but rather whether they correlate to irrational prejudice, are central to individual identity, and are not something the government may be allowed to insist on changing. *Watkins II*, 875 F.2d at 725-26. The fact that individuals may be able to alter the appearance of traits correlated to their sex, race, or national origin, for example, does not make it constitutional for the government to discriminate on these grounds.

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<sup>15</sup> With reference to the decision of the Vermont court in *Baker*, the State below seemed to criticize the *Tanner* court’s recognition that the personal characteristic that defines a vulnerable group may not need to be “immutable” for the classification to be “suspect.” [State’s Superior Court Brief at p 15, fn. 6.] The Intervenor went further and tried to make much of the *Baker* court’s “disagreement” with *Tanner*. This was misleading, as the *Baker* majority did not use the federal “tiered” analysis at all, and the *Baker* concurrence embraced *Tanner* explicitly as “entirely consistent” with Vermont’s past interpretation of its “common benefits” clause, en route to concurring in the judgment that the state may not discriminate in its provision of rights and benefits to those in same-sex rather than different-sex relationships. 170 Vt. at 229, 235.

*Tanner* noted that gender reassignment surgery and other medical procedures now make it possible to alter features related to one's sex, race and other personal traits, but that potential for change does not change the "suspect" nature of legal rules drawn using them<sup>16</sup>. The same is true for the seemingly easy "choice" to switch one's religious identification.

As Judge Norris of the Ninth Circuit put it, "'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically." *Watkins II*, 875 F.2d at 725-26. He concluded that sexual orientation must be seen as such a trait because it is central to identity and correlated with invidious stereotypes, as well as not readily changeable.<sup>17</sup>

Although subsequent to *Watkins* the Ninth Circuit ruled in *High Tech Gays* that sexual orientation is "behavioral," the Circuit has corrected that error more recently, holding that "Sexual

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<sup>16</sup> 157 Or.App. 502, 971 P.2d 435 (1998).

<sup>17</sup> Judge Norris stated: "Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. [citations omitted] Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation. . . . It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment. [citations omitted]. But the possibility of such a difficult and traumatic change does not make sexual orientation 'mutable' for equal protection purposes." *Watkins II*, 875 at 725-26.

orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them. The American Psychological Association has condemned as unethical the attempted 'conversion' of gays and lesbians." *Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084, 1093 (9<sup>th</sup> Cir. 2000) (allowing an effeminate gay man to seek asylum based on having been persecuted for his social group membership).<sup>18</sup>

The *Tanner* court was correct to conclude that sexual orientation is a distinguishing trait that is generally irrelevant to one's ability to contribute to society, that correlates with invidious prejudice, and that it is sufficiently fixed and central to one's identity that government discrimination on that basis should be considered "suspect" and scrutinized closely. What is true in Oregon should be true in Washington.

c. *Lesbians and gay men have limited ability to obtain redress through the political process.*

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<sup>18</sup> That sexual orientation is not readily changeable is beyond dispute scientifically. McKeever Decl. at ¶ 4. Like the American Psychological Association, the American Psychiatric Association also opposes mental health treatment based on the assumption that a patient should change sexual orientation. See American Psychiatric Ass'n, No. 98-56, Position Statement on Psychiatric Treatment and Sexual Orientation, available at [www.psych.org/archives/news\\_room/press\\_releases/rep\\_therapy.cfm](http://www.psych.org/archives/news_room/press_releases/rep_therapy.cfm) (last viewed 7/9/2004). Explained APA President Rodrigo Munoz, M.D., "There is no scientific evidence that reparative or conversion therapy is effective in changing a person's sexual orientation. There is, however, evidence that this type of therapy can be destructive." That some individuals with a same-sex sexual orientation undergo conversion therapy with a sincere wish to change does not make sexual orientation "mutable" within the meaning of equality doctrine.

Appellants contended below that laws that burden or exclude gay people do not deserve strict scrutiny because lesbians and gay men are not “politically powerless.” They cited passage of a few laws and ordinances forbidding discrimination, hate crimes and malicious harassment based on sexual orientation. Appellants also proffered the notion that Washington is not as bad for gay people as some other places, such as Florida, which does not permit gay adults to adopt children.<sup>19</sup>

But the existence of a few laws addressing the most egregious abuse of gay people does not mean this minority group is able to obtain redress for unjust treatment through the majoritarian processes. Moreover, racial and ethnic minorities and women now have comprehensive anti-discrimination legislation at both the federal and state level; nevertheless, heightened constitutional scrutiny still applies to governmental classifications based on race, national origin and sex. The reasons to suspect that a disfavored minority may be unable to obtain a fair remedy in the political arenas remain, even as the group makes incremental strides.

The same is true for lesbians and gay men, who have only just begun to secure legal protections in Washington, but

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<sup>19</sup> See *Lofton v. Secretary of the Dep’t of Children and Family Serv.*, 358 F.2d 804 (11<sup>th</sup> Cir. 2004).

remain notably underrepresented in state government,<sup>20</sup> have been unable, despite repeated attempts, to obtain passage of a statewide anti-discrimination law, and who were undeniably powerless to stop the marriage exclusion bill at issue here. *Accord Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari*, joined by Marshall, J.) (noting that “[b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena”).

Clearly, classifications that exclude gay people as a class have all the features that warrant great skepticism and the closest scrutiny.<sup>21</sup>

d. *Appellants offer only token contrary analysis.*

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<sup>20</sup> In 2003 there were thirteen openly gay officeholders in the State of Washington. In the history of Washington there have been five openly gay members of the Legislature. Four are serving now. This is considered a “large” number. David Ammons, “Washington’s ‘Will & Grace Caucus’ Balloons,” *The Olympian*, February 3, 2003. California, with over 35 million residents, has six openly gay state legislators. State of California, Dept. of Finance, *California Current Population Survey Basic Report: March 2004 Data*. (Sacramento, CA, Oct. 2004), available at [http://www.dof.ca.gov/HTML/DEMOGRAP/CPS\\_2004\\_CA\\_basic\\_profile.pdf](http://www.dof.ca.gov/HTML/DEMOGRAP/CPS_2004_CA_basic_profile.pdf).

<sup>21</sup> Respected commentators for years have been explaining that the doctrine developed in cases of race and sex discrimination seems unavoidably to require analogous treatment for sexual orientation classifications. See, e.g., Kenji Yoshino, *Suspect Symbols*, 96 Colum. L. Rev. 1753 (1996); Chai Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237 (1996); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915 (1989); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161 (1988); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985).

As in the trial court, none of the appellants offers substantial explanation for why sexual orientation classifications should not be deemed “suspect,” given Washington’s established test.

The State acknowledges the elements of the test [State’s Brief at 19], but contends that this characteristic *is* relevant to its legitimate interests. [State’s Brief at 30]. But, after citing *Singer’s* circular invocation of the “definition” of marriage and generalized concern about heterosexual procreation, the State does not engage in the required equality analysis. It offers no explanation of why this Court should not follow *Tanner*, but merely asserts that such is not required. [State’s Brief at 32]<sup>22</sup>.

King County reiterates, as below, that no federal court has *ever* held that laws excluding gay people should be considered suspect. [County’s Brief at 30]. This is incorrect. A number of federal courts have done so in persuasive opinions considering each of the relevant factors. *See, e.g., Watkins v. U.S. Army*, 847

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<sup>22</sup> “Circular reasoning” has been a recurring feature of equal marriage rights litigation. *See, Hernandez et al. v. Robles*, No. 103434/2004, slip. op. at \_\_\_ (N.Y. Sup. Ct. February 4, 2005). As Judge Ling-Cohan explained, “[E]ven if the premise of amici’s argument were correct, the conclusion that amici draw from it would be invalid. ‘[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what is historically has been.’ *Goodrich v. Dept. of Public Health*, 440 Mass. 309, 319, 798 NE2d 941, 952 (2003); *see Halpern v. Attorney General of Canada*, 172 O.A.C. 276, S.71 (2003) ‘[A]n argument that marriage is heterosexual because it “just is” amounts to circular reasoning. It sidesteps the entire analysis.’... *Baehr v. Lewin*, 74 Haw. 530, 565, 852 P.2d 44, 61 (1993) (argument that ‘the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman’ deemed ‘circular and unpersuasive.’”

F.2d 1329, 1349 (9<sup>th</sup> Cir.1988) ("*Watkins I*") (finding that "the principles underlying equal protection doctrine – the principles that give rise to these factors in the first place – compel us to conclude that homosexuals constitute a suspect class"), *aff'd on different grounds*, 875 F.2d 699 (9<sup>th</sup> Cir. 1989) (en banc) ("*Watkins II*").<sup>23</sup>

It is true that numerous federal circuits, relying on *Bowers*, held otherwise. But "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Lawrence v. Texas*, 539 US 558, 123 S Ct 2472, 2484, 156 L Ed 2d \_\_\_\_\_, (2003).<sup>24</sup> As Judge Hicks observed, those outdated appellate

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<sup>23</sup> Numerous district courts so held, although their analyses were rejected by circuit courts that relied on *Bowers v. Hardwick*. See, e.g., *Equality Foundation of Greater Cincinnati v. Cincinnati*, 860 F. Supp. 417, 434-40 (S.D. Ohio 1994) (holding that "sexual orientation, whether homosexual or heterosexual, exists independently of any conduct . . . gays, lesbians and bisexuals meet the requisite criteria for quasi-suspect status."); *Jantz v. Muci*, 759 F. Supp. 1543, 1546-51 (D. Kan. 1991) (finding that "discrimination based on sexual orientation is inherently suspect. . . . No other identifiable minority group faces the dilemma dealt with every day by the homosexual community – the combination of active and virulent prejudice with the lack of an effective political voice."); *Ben-Shalom v. Marsh*, 703 F. Supp. 1372, 1380 (E.D. Wis. 1989) (noting that "homosexuals constitute between 8% and 15% of the population . . . [and] . . . constitute a discrete and insular group subject to potential prejudicial political power."); *High Tech Gays v. Def. Indus. Security Clearance Office*, 668 F. Supp. 1361, 1368-70 (N.D. Cal. 1987) (observing that "Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society. . . . [M]any gay people face the threat of physical violence on American streets today. . . . Wholly unfounded, degrading stereotypes about lesbians and gay men abound in American society.").

<sup>24</sup> Moreover, even with the now-discredited *Bowers* (478 U.S. 186 (1986)) as a guide, those decisions were not without controversy in their day. See, e.g., *High Tech Gays*, 909 F.2d 375 (Canby, J., dissenting from denial of rehearing en banc; Norris, J., joining), (warning that "A panel of this court has held that our government may discriminate against homosexuals whenever it is able to put forth a rational basis for doing so. That decision is wrong, and it will have tragic

decisions stand for little today, their underpinnings having collapsed.<sup>25</sup> Moreover, although the Supreme Court did not make explicit in either *Romer* or in *Lawrence* what standard will be applied to future cases of sexual orientation discrimination, the Court's unmistakable recognition in both cases that gay people constitute a vulnerable minority entitled to and needing constitutional protection is the starting point for the analyses to come.<sup>26</sup>

None of these appellants actually has engaged in the analysis required to determine whether classifications that exclude gay people as a group should be considered suspect. By contrast, a full generation ago, Justice Brennan called upon his fellow jurists to do so and to apply some form of heightened scrutiny to sexual orientation discrimination because it is so "likely . . . to reflect deep-

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results. . . . [It] skews equal protection analysis as ordained by the Supreme Court.").

<sup>25</sup> *Lofton v. Secretary of the Dep't of Children and Family Serv.*, 358 F.2d 804 (11<sup>th</sup> Cir. 2004), does not dictate a different result. In *Lofton*, the exceptionally conservative Eleventh Circuit read *Lawrence* as having applied minimal scrutiny, notwithstanding that it had applied classic fundamental rights cases and that it had expressly overruled *Bowers'* holding that the fundamental right to sexual privacy does not apply to gay people. See 377 F.3d 1275, 1304-10 (Barkett, J., dissenting from the denial of rehearing en banc).

<sup>26</sup> The State characterizes the Vermont Supreme Court's decision in *Baker* as having held that sexual orientation classifications are not suspect. Answer at p. 14 n.5. In fact, the Vermont court held that that the "rigid categories" of federal equal protection jurisprudence are not relevant when analyzing cases under the Vermont Common Benefits Clause, the mandate of which was not merely to promise equality before the law, but rather to guarantee "an equal share in the fruits of the common enterprise." That is, it promises equality of results. 170 Vt. At 206, 208-09. Applying Vermont's own test for enforcing that guarantee, the court concluded that the State had failed to show "a reasonable and just basis" for continuing its marriage discrimination against same-sex couples. *Id.* at 224.

seated prejudice rather than . . . rationality.” *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (dissenting from denial of *certiorari*, Marshall, J., joining). The persistence of anti-gay bias in Washington today, which is sadly manifest in DOMA’s legislative record and across the state, proves that such scrutiny is overdue.

*II. Even If Sexual Orientation Discrimination Did Not Warrant Strict Scrutiny, the Marriage Exclusion Would Still Violate Article I, Section 12, Because There is No Reasonable Basis for Treating Same-Sex Couples Differently From Different-Sex Couples.*

As discussed above in Section I, the marriage exclusion violates Article I, Section 12 because it fails to satisfy the applicable strict scrutiny standard. Nevertheless, even if sexual orientation discrimination were not subject to strict scrutiny, DOMA would be unconstitutional because no “reasonable grounds” exist for the classification in relation to a legitimate purpose of the statute.

*A. Same-Sex Couples Are Similarly Situated to Different-Sex Couples.*

As the families of Respondents demonstrate, numerous lesbian and gay couples in Washington share their lives and create families together. Nevertheless, one of the reasons so much bad law has been made regarding the rights of gay and lesbian people in the United States<sup>27</sup> is because there has been so little statistical

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<sup>27</sup> Consider, for example, Jonathan Rauch’s “What is marriage for?” (Jonathan Rauch, *Gay Marriage: Why It is Good For Gays, Good for Straights, and Good For America* (Times Books/Henry Holt & Co., 2004), at 14. “You could

data upon which to rely in understanding this community. As UCLA Law School professors William Rubenstein and Bradley Sears have written, "There is almost no research in the scholarly literature utilizing empirical data."<sup>28</sup>

Rubenstein and Sears are prominent analysts of important, population-based scholarship that has become possible in this century as a result of data from the 1990 and 2000 federal censuses<sup>29</sup>, which allowed respondents to identify themselves both by sex and as "unmarried partners."<sup>30</sup>

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turn to the statute books," he writes. "Law is, after all, dense with legal prerogatives enjoyed by married couples and dense cases (often divorces) allocating assets and resolving conflicts. But you will find surprisingly little about what marriage is for and what one must or must not, or should or should not, go on within it. Instead, you will find definitions like the one a Washington State Court provided in a 1974 case in which two men tried to get a marriage license. Marriage, said the court, is defined as 'the legal union of one man and one woman.' The case revealed marriage, writes the philosopher Richard Mohr, 'at least as legally understood, to be nothing but an empty space, delimited only by what it excludes- gay couples.'" Rauch goes on to describe how virtually all civic institutions require people to do things to get, or maintain, a status of privilege like a driver's license or the right to vote, without which, such things are lost. By contrast, he observes, one can assault one's spouse and that does not automatically end the marriage. People do not have to know each other or even meet before marrying. They do not have to live together. They do not have to remain monogamous. There is no age limit to marriage, nor any requirement that marriages produce children. Married couples can be separated for years at a time- voluntarily or involuntarily- and remain married. People can marry on their deathbeds, or on the way to the electric chair. Rauch, at 14-15.

<sup>28</sup> William B. Rubenstein and R. Bradley Sears, UCLA School of Law/The Williams Project on Sexual Orientation Law and Public Policy, "Data from Census 2000 About Same-Sex Couples in Washington and the United States," Washington Judicial Conference, Spokane, Sept. 21, 2004.

<sup>29</sup> Demographer Gary Gates, for example, has done remarkable work with the 2000 census data; see Gary J. Gates and Jason Ost, *The Gay and Lesbian Atlas* (The Urban Institute, 2004), illustrating gay and lesbian household residential patterns and demographic characteristics by county in each state as well as in the United States' twenty-five largest cities.

See also, Alain Dang and Songen Frazer, *Black Same-Sex Households in the United States: A Report from the 2000 Census* (National Gay and Lesbian Task Force Policy Institute/National Black Justice Coalition, 2004); R. Bradley

What the data reveals is how strikingly familiar, indeed ordinary, the lives of same-sex couples are. They rent or buy homes. They have and raise children. They support their unemployed or disabled partners. They wrestle with classic questions such as:

“-Should we wait until I find a job before getting married or moving in together?

“-Can we afford to have another child?

“-Will only one of us be primarily responsible for taking care of our children? If so, which one of us should take on those responsibilities?

“-How will I provide for myself if my marriage or relationship ends?”

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Sears and M.V. Lee Badgett, *Same-Sex Couples and Same-Sex Couples Raising Children in California* (UCLA School of Law/Williams Project and University of Massachusetts at Amherst/Institute for Gay and Lesbian Strategic Studies, 2004); Lisa Bennett and Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents* (Human Rights Campaign Foundation/The Urban Institute, 2004).

The Census data has permitted scholars to build upon and confirm the hypotheses posed by social scientists in diverse fields describing and quantifying characteristics of gay and lesbian people in modern America. See, e.g., Mark Herzog, *The Lavender Vote: Lesbians, Gay Men and Bisexuals in American Electoral Politics* (New York University Press, 1996), analyzing state and federal election exit polling data after 1990- the first year such polling attempted to identify sexual orientation as a factor in voter turnout and views of issues. See also, M.V. Lee Badgett, *Money, Myths and Change: The Economic Lives of Lesbians and Gay Men* (University of Chicago Press, 2001). Badgett, a University of Massachusetts at Amherst economist, has done groundbreaking work in the study of economic behavior of gays and lesbians, as well as how legal structures work economic disadvantages upon them.

-Should my spouse or partner accept a transfer to a better job in a different city?"<sup>31</sup>

*B. Same-Sex Couples Are Denied the Legal Support and Benefits of Marriage That Virtually Identically Situated Different-Sex Couples Enjoy.*

Studies of the 2000 Washington census data by three sets of researchers reach almost identical conclusions: Washington is home to significant numbers of same-sex couples. One in four of them are raising children. Same-sex couples are very similar to married couples and unmarried different-sex couples.<sup>32</sup>

15,900 same-sex couples identified themselves as such in the 2000 census in Washington<sup>33</sup>. There are same-sex couples in

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<sup>31</sup> M.V. Lee Badgett, *Money, Myths and Change: The Economic Lives of Lesbians and Gay Men*, at 135.

<sup>32</sup> Rubenstein and Sears, Washington Judicial Conference presentation; Declaration of Marieka Klawitter, Ph.D (Appendix 1); Gary J. Gates and Jason Ost, *The Gay and Lesbian Atlas* (The Urban Institute, 2004), at pp. 2-52; 60-61; 158-59; 216-17. A breakdown of the census data by county, zip code and census tract is available on the Internet at [www.gaydemographics.org](http://www.gaydemographics.org). Judge Ling-Cohan of the New York County Supreme Court found the 2000 Census data instructive because the proof that same-sex and different-sex households are so similar confirmed the soundness of New York's policies recognizing that "the State's thousands of same-sex couples fit the definition of 'family'; that they are able to provide a loving a stable home for their biological or adoptive children; and that they are entitled to benefit from the same rights accorded to married couples." See, *Hernandez et al. v. Robles*, No. 103434/2004, slip. op. at \_\_\_ (N.Y. Sup. Ct. February 4, 2005) (finding that New York's exclusion of same-sex couples from civil marriage violates the state constitution, and approvingly citing the trial court decisions in both *Andersen* and *Castle*).

<sup>33</sup> Rubenstein and Sears, and Klawitter (Appendix 1, 2), as well as Gates and Ost, *The Gay and Lesbian Atlas* (also note a significant likely undercount of same-sex couples due to social/economic factors like education levels of respondents and reluctance to report such information to a perceived hostile government, as well as difficulties in interpreting the Census question's answer choices.

every county in Washington. Washington ranks ninth among the fifty states in number of same-sex couples; Seattle ranks third among large cities in the United States.

The racial and ethnic origins of same-sex Washington couples track those of married and unmarried different-sex couples: about 85% white; 4% black and 5% Asian. 17% of same-sex couples are interracial, versus 11% of unmarried couples and 20% of married ones. Married couples and same-sex couples are significantly older than unmarried couples in Washington: 49, 46 and 37 years old on average, respectively. 95% of same-sex couples are U.S. citizens, as are 94% of unmarried Washington couples. 91% of married couples in this state are both citizens.

Home ownership skews sharply in favor of married couples in Washington. 80% own or are buying their homes, compared to 65% of same-sex couples and 43% of unmarried different-sex couples.<sup>34</sup>

There is a significant difference in family income as well: married couples in Washington average \$83,000 per year. Same-sex couples average \$72,000, and unmarried different-sex couples average about \$57,000 a year.

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<sup>34</sup> See Supplemental Declaration of Marieka Klawitter, Ph.D (discussing proper methodologies for conducting demographic studies and explaining that the figures for same-sex couples fall between those for married and unmarried different-sex couples because the population of same-sex couples includes both those who would marry and those who would choose not to if the choice were available to them) (Appendix 2).

About 40% of same-sex couples have college or higher degrees; 28% of married couples and 20% of unmarried different-sex couples do. Klawitter (Appendix 1) notes twice as many married couples have one partner out of the work force, "likely because of the larger number of stay-at-home parents. Marriage might allow more same-sex couples to choose to have one member remain at home with children without loss of employment-based health benefits."<sup>35</sup>

Despite the discriminatory prohibition on service by persons who acknowledge openly that they are gay or lesbian, same-sex couples show similar rates of service in the military as married couples (17% and 20%, respectively).

Overall, the census data demonstrates that same-sex couples have lower household incomes and home ownership rates, and are more likely to include racial or ethnic majorities or disabled partners. These factors translate into a greater likelihood of discrimination in employment, housing or rental markets. This in turn makes providing for children more difficult for same-sex couples. Yet, as Judge Hicks notes in his opinion,<sup>36</sup> Washington allows same-sex couples and single gay and lesbian people to adopt at the same time discrimination against them is allowed in housing, employment, and marriage. This public license for

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<sup>35</sup> Klawitter Declaration, p.5, section 22.

<sup>36</sup> *Castle*, Memorandum Opinion of Judge Hicks, at 4, 31-35.

injustice translates into a systemic bias against the children of gay and lesbian residents of Washington.

C. *Denial of Equal Marriage Rights Imposes Significant Financial Burdens on Same-Sex Couples That Are Not Imposed on Different-Sex Couples.*

Census studies show that about 24% of same-sex couples in Washington are raising children (19% of male couples; 28% of females couples). 46% of married couples have minor children at home, and 40% of unmarried different-sex couples do.

At least 3400 same-sex couples are raising children in Washington. Yet their inability to marry imposes significant financial burdens and risks not shared by their married neighbors and friends. While the following examples involve federal mandates beyond the scope of these cases, the outcomes are nevertheless instructive as to the inequalities marriage discrimination imposes:

-Same-sex couples are less likely to have access to family health insurance, and when they do, it costs them more.<sup>37</sup>

-If a same-sex parent dies, his or her survivor and child(ren) stand to lose as much as \$250,000 in Social Security survivor benefits over time. Married, there would be no question of the survivors' qualification.

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<sup>37</sup> Lisa Bennett and Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents* (Human Rights Campaign Foundation/The Urban Institute, 2004).

-When one member of a same-sex couple stays home to raise their children, that couple pays more in income taxes than a married couple.

-Seniors who are in same-sex partnerships made up 10% of same-sex respondents in the 2000 Census. When one dies, the other cannot receive Social Security survivor benefits, which allow the survivor to retain the higher benefit level of the two spouses after one dies. The average difference between two same-sex partners' Social Security benefits is \$5,528. If the partner with the higher income level dies, the survivor in a same-sex relationship in Washington faces a loss of *one-fifth* of the \$25,200 average annual income of a retired same-sex couple.<sup>38</sup>

#### *IV. Marriage Discrimination Is Costly.*

When all else fails, people will usually argue that change will cost money. Even by this measure, however, there is a small but growing body of evidence that state and federal governments will derive more revenue if same-sex couples can marry.

A 2004 Congressional Budget Office study, prepared for Rep. Steve Chabot, chair of the U.S. House of Representatives' Judiciary Committee's Subcommittee on the Constitution for its

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<sup>38</sup> Gary J. Gates and Jason Ost, *The Gay and Lesbian Atlas* (The Urban Institute, 2004), at 223. See also Lisa Bennett and Gary J. Gates, *The Costs of Marriage Inequality to Gay, Lesbian and Bisexual Seniors* (Human Rights Campaign Foundation/The Urban Institute, 2004).

consideration of a federal constitutional amendment to mandate discrimination against same-sex marriage, concluded that legalizing equal marriage rights would generate about \$400 million a year in extra federal revenue between 2005 and 2010, and \$500 to \$700 million between 2011 and 2014.<sup>39</sup>

While no such study has been reported in Washington, state studies done elsewhere replicate the CBO results at the state level.<sup>40</sup> A 2004 Williams Project/ Institute for Gay & Lesbian Strategic Studies report concluded that California would reap a net gain of \$22.3 to \$25.2 million a year to the state budget by permitting same-sex couples to marry.<sup>41</sup>

In *The Gay and Lesbian Atlas*<sup>42</sup>, Gates and Ost note that

One of the most intriguing uses for census data on gay and lesbian location comes from Richard Florida, best-selling author of *The Rise of the Creative Class*

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<sup>39</sup> Congressional Budget Office, "The Potential Budgetary Impact of Recognizing Same-Sex Marriage," June 21, 2004, [www.cbo.gov/showdoc.cfm?index=5559](http://www.cbo.gov/showdoc.cfm?index=5559).

<sup>40</sup> See, for example, R. Bradley Sears and M.V. Lee Badgett, "The Impact on California's Budget of Allowing Same-Sex Couples to Marry" (UCLA School of Law/Williams Project/Institute for Gay & Lesbian Strategic Studies, 2004); Badgett and Gary J. Gates, "The Business Cost Impact of Marriage for Same-Sex Couples," (Human Rights Campaign Foundation/Institute for Gay & Lesbian Strategic Studies, 2004); and Badgett, "The Fiscal Impact on the State of Vermont of Allowing Same-Sex Marriage," (Institute for Gay & Lesbian Strategic Studies, 1998). Studies to the same effect have been done in Connecticut and New Jersey.

<sup>41</sup> R. Bradley Sears and M.V. Lee Badgett, "The Impact of Allowing Same-Sex Couples to Marry on California's Budget," UCLA School of Law/Williams Project/Institute for Gay & Lesbian Strategic Studies, 2004.

<sup>42</sup> Gates and Ost, *supra*, at 5-6.

(Florida 2002), who argues that creativity constitutes the central driving force for success in today's economy. Florida posits that regions must attract and retain creative and innovative people to secure a promising economic future, and will thrive when individuals with diverse backgrounds and viewpoints can easily interact. Because a concentration of gay and lesbian couples signifies diversity, knowing where they live can prove useful to those communities.<sup>43</sup>

Gates goes on to recall the link between diversity and economic success that was first explored in a 2002 Brookings Institution paper he co-authored with Florida:

The authors demonstrate a strong link between a thriving tech economy and diverse populations, including those with high concentrations of gay couples. The presence of a large gay and lesbian population serves as one signal of a high level of community diversity, tolerance, and acceptance for people who are different. This tolerance, the authors find, creates low barriers to entry for all people into the labor market and enables firms to draw from the widest possible mix of creative and innovative employees.<sup>44</sup>

Florida, for his part, calls the essence of economic development The Three T's: Technology, Talent and Tolerance. Analyzing various economic, census and demographic data, he arrived at a Creativity Index that ranks Seattle in the top five large cities in the nation for creativity, tolerance, technology and other measures. "As a group," he explains,

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<sup>43</sup> Gates and Ost, *supra*, at 5.

<sup>44</sup> Gates and Ost, *supra*, at 5.

gays have been subject to a particularly high level of discrimination. Attempts by gays to integrate into the mainstream of society have met substantial opposition. To some extent, homosexuality represents that last frontier of diversity in our society, and this a place that welcomes the gay community welcomes all kinds of people. As [Gary] Gates sometimes says, gays can be said to be the 'canaries of the Creative Age.'<sup>45</sup>

Equal marriage rights will underpin Washington's evolution into a great power in a world economy.

## V. CONCLUSION.

In a new century, in a state populated by immigrants from America and the world, governed under a Constitution whose framers mandated, "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government,"<sup>46</sup> rooting out invidious, destructive discrimination ought to be a priority for a government of the people.

In "The Courts of the Washington Territory: 1853-1889,"<sup>47</sup> Chief Justice Alexander praised the Territorial Court's decision in *Elick v. Washington Territory*, 1 Wash. Terr. 137 (1861), which anticipated by three decades Justice John Marshall Harlan's stirring

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<sup>45</sup> Richard Florida, *The Rise of the Creative Class* 255-56 (Basic Books, 2002).

<sup>46</sup> Justice Robert F. Utter and High D. Spitzer, *The Washington Constitution: A Reference Guide* (Greenwood Press, 2002), at 44-45 (quoting Article I, Section 31 of the Washington Constitution).

<sup>47</sup> *Washington State Bar News*, Vol. 57, No. 11 (Nov. 2003), at 20-27.

dissent in *Plessy v. Ferguson*<sup>48</sup>, “[O]ur constitution is colorblind and neither knows nor tolerates classes among citizens.” The Chief Justice concluded,

[W]e can take pride in the fact that a court from which our state’s present day courts have descended recognized the fundamental responsibility that is placed on courts at all levels- to protect the rights of those in society who are least able to protect themselves. In all fairness, one would have to say that as lawyers and judges we have not always lived up to those noble words. But I hope that for the most part we have, and will continue to do so in the future. When we do, we tip our hats to our judicial forbears who had the courage to act in a way that set a shining example for us all to follow.<sup>49</sup>

Once again, this Court has an opportunity to apply core constitutional principles to protect those “who are least able to protect themselves,” and doing so, to be faithful to Washington’s proudest traditions.

Respectfully submitted this \_\_\_\_ day of February, 2005.

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<sup>48</sup> 163 U.S. 537 (1896).

<sup>49</sup> Alexander, *supra*, at 36-27.