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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*,
 v.
 STATE OF WASHINGTON, *Appellant*,
 and
 SENATOR VAL STEVENS, et al., *Intervenor Appellants*.

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

CECELIA CASTLE, et al., *Respondents*,
 v.
 STATE OF WASHINGTON, *Appellant*.

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

INTERVENOR'S SUPPLEMENTAL RESPONSE BRIEF

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Respondents ask this Court to apply a higher level of scrutiny to Washington's long-standing marriage limitation. Neither the United States Supreme Court nor this Court have used Respondents' burden-shifting test absent another basis on which to apply heightened scrutiny.

1. Respondents' burden-shifting test is not applicable.

Respondents have not cited any case applying their burden-shifting test when no suspect or quasi-suspect class is involved. Nor has the test been used where heightened scrutiny is not already warranted. The burden-shifting test applies to claims involving suspect or quasi-suspect classes because the courts (and our society) have already concluded that these characteristics are rarely relevant to permissible legislative goals. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1987). Heightened scrutiny, applied through the burden-shifting test, stems from the fact that persons in suspect classes are usually similarly situated to those outside of suspect classes.

Respondents ask this Court to apply a test that assumes (without proof) that they are similarly situated with opposite-sex couples. Homosexuals are not members of a suspect or quasi-suspect class. *Intervenors' Brief*, pp. 27-33; *Intervenors' Reply Brief*, pp. 24-31. Thus,

the Legislature's actions are reviewed under the rational basis test.¹ Nor do homosexuals receive *de facto* suspect class recognition because the law enhances penalties for crimes motivated by animus against homosexuals. Nothing in the "hate crimes" legislation suggests that the Legislature intended to create a definable suspect class. Rather, the focus of such legislation is on the intent of the perpetrator, not on the victim's traits or conduct. *See* RCW 9A.36.078; RCW 9A.36.080.

Even if the burden-shifting test was applicable, Respondents have insufficient proof of animus. The isolated statements of a few legislators do not prove that the bi-partisan, super-majority Legislature passed the "Defense of Marriage Act" based on invidious discrimination. *Id.*² Nor is a legislator's statement of "moral disapproval" evidence of a desire to harm homosexuals.

Respondents also ignore the undisputed fact that DOMA merely restates the definition of marriage enacted in 1881. Respondents make no attempt to show animus with respect to the 1881 marriage limitation. Code of Washington § 2380 (1881). Moreover, nearly all of the courts that have

¹ *Seeley v. State*, 132 Wn.2d 776, 795, 940 P.2d 604 (1997). As argued previously, Washington's marriage limitation passes constitutional muster even if the Court engages in an independent analysis.

² *See Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 154, 839 P.2d 324 (1992); *In re F.D. Processing, Inc.* 119 Wn. 2d 452, 832 P.2d 1303 (1992).

considered this issue (even when granting marriage benefits to gay unions) have rejected the claim that a law, consistent with the clear meaning of a term for hundreds of years, and with more than a century of constitutional law, can be based upon animus against a later-defined discrete class of people.³

2. Lawrence and Romer do not support use of the test.

Respondents suggest that this Court should impose the burden-shifting test based on *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), and *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). However, *Lawrence* addressed private conduct, not public recognition or benefits. Nowhere does *Lawrence* mention a burden-shifting test. Neither does it find the presence of a fundamental right or suspect class. *Lawrence* applied the rational basis test and explicitly stated that it was not addressing a right to same-sex marriage. *Lawrence*, 539 U.S. at 578; *id.* at 2492 (Scalia, J. dissenting).

Similarly, *Romer* also applied the rational basis test. The *Romer* court found that Amendment 2 prohibited Colorado from extending to homosexuals the same basic protections that everyone else enjoyed.

³ *Baker v. State*, 170 Vt. 194, 744 A.2d 864, 887 (1999); *In re Kandu*, 315 B.R. 123, 148 Bankr. L. Rep. P 80, 145 (2004); *Standhardt v. Superior Court*, 206 Ariz. 276, 77 P.3d 451, 465 (2004).

Commentators have noted that “[t]he case would have come out exactly the same way had the Amendment denied any ‘narrowly defined’ group—homosexuals, smokers, convicted felons, prostitutes, insurance salesmen—protection ‘against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.’” Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 Wm. & Mary Bill of Rts. J. 147, 149 (1997) (quoting *Romer*, 517 U.S. at 631) (emphasis added).⁴

Amendment 2 was **not** unconstitutional because it referred to homosexuals nor does it support heightened scrutiny for classifications that impact homosexual conduct. Amendment 2 was unconstitutional because it permitted broad and unlimited discrimination. The Supreme Court held that Amendment 2’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment **seems inexplicable by anything but animus** toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Romer*, 517 U.S. at 631.

Washington’s marriage limitation is not “inexplicable by anything but animus.” The limitation exists for reasons that have nothing to do with

⁴ See also Hills, *Is Amendment 2 Really a Bill of Attainder?*, 95 Mich. L. Rev. 236, 251 (1996).

gay behavior or identity. It exists to direct heterosexual procreation into the family form that many social scientists and our collective experience strongly suggest is the optimal form in which to raise children. Intervenor's Brief, pp. 35-48; Intervenors' Reply Brief, pp. 32-41.

This Court should not apply heightened scrutiny (even under the auspices of the burden-shifting test). Washington, along with 41 other states, has merely affirmed the definition of marriage that the courts have used for more than one hundred years. Intervenors respectfully submit that this Court should resist the urge to take matters into its own hands and permanently remove this controversial public policy issue from debate in the Legislature and among the citizenry.

RESPECTFULLY SUBMITTED this 24th day of May, 2005.

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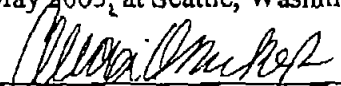
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