

NO. 75934-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN, et al.,

Respondents,

v.

KING COUNTY, et al.,

Appellants,

v.

STATE OF WASHINGTON,

Appellant,

And

SENATOR VAL STEVENS, et al.,

Appellants (Intervenors).

APPEAL FROM THE SUPERIOR COURT
IN AND FOR KING COUNTY
THE HONORABLE WILLIAM L. DOWING

APPELLANT INTERVENORS' RESPONSE TO AMICI CURIAE
BRIEFS

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Appellant Intervenors herein respond to new arguments raised by amici curiae American Psychological Association, “Children’s Rights Organizations,” and State Legislators. The arguments raised by other amici curiae supporting Respondents were adequately addressed in Appellants’ briefing previously submitted to the Court.

A. Response to Briefs of Amici Curiae American Psychological Association and “Children’s Rights Organizations.”

Amici American Psychological Association (APA) and self-proclaimed “Children’s Rights Organizations” (CRO) cite to a number of social science studies in support of their contention that the relationships and parenting of same-sex couples and opposite sex couples are substantially the same. They claim further that this contention is no longer subject to debate. For the following reasons, their arguments are without merit.

1.Fidelity: From a nationwide study of 706 male unions and 506 female unions performed by the Journal of Gay and Lesbian Social Services, nine percent of female unions and thirty-seven percent of male unions had non-monogamy agreements. CP 536 (Satinover, ¶ 7). From a study published in *AIDS* in 2003 of homosexual men in the Netherlands, the “rate at which men with a steady partner acquire casual partners”

averaged eight per year, and those without steady partners, averaged twenty-two casual sex partners per year. Maria Xiridou, 17 *AIDS* 1031 (2003). By contrast, a survey of 884 men and 1,288 women found 77 percent of men and 88 percent of women remained faithful to their opposite-sex spouses. Michael W. Wiederman, "Extramarital Sex: Prevalence and Correlates in National Survey," 34 *Journal of Sex Research* 170 (Spring 1997). The differences between same and opposite-sex relationships in the important area of fidelity suggests that the debate regarding the equivalency of these relationships is far from over.

2. Stability: Similarly, the stability of same-sex unions differ significantly from opposite-sex unions. In a study by the Journal of Gay and Lesbian Social Services, the average same-sex female union lasted 4.9 years, same-sex male couple 6.9 years and opposite-sex couple 20 years. CP 535 (Satinover, ¶6, ¶7). *Journal of Gay and Lesbian Social Services* 1(2), 101-117 (1994).

3. Sexual Identity: Studies indicate three percent of adult females have ever engaged in some form of homosexual behavior in their lifetime. A.M. Johnson, "Sexual Lifestyles and HIV Risk," *Nature* 360 (1992). By contrast, 12 percent of children of lesbians become *active* lesbians, a rate at least four times the base rate of lesbianism in the adult population.

Tasker and Golombok, "Adults Raised as Children in Lesbian Families," *Developmental Psychology*, 213.

Clearly, fidelity, stability and the sexual identity of children are key indicia in any credible comparison of same and opposite-sex relationships. Gay, lesbian and heterosexual unions are not the same.

Many of the children raised by gay and lesbian couples are the offspring of one of the partners and an opposite-sex partner from a prior relationship. Accordingly, gay and lesbian households with children resemble heterosexual, step-parent households in which one parent is not biologically related to the child(ren) of his or her partner. The brief of Amicus Curiae Alliance for Marriage, Inc. (Alliance) summarizes a number of social science studies demonstrating that children raised in homes headed by opposite-sex couples fare better in nearly all important areas of child development¹ as compared to step-parent households and single parent households. Brief of Alliance, pgs. 7-11.

Moreover, the unique and non-fungible nature of each gender's parenting style and interaction with children is supported by social science-- not to mention common sense. Brief of Alliance, pgs. 12-14. Dr. Linda Gunsberg notes "the father and the mother offer different and

¹ These areas include: 1) alcohol and drug abuse; 2) emotional and behavior problems, 3) depression and suicide, 4) premarital sex and out-of-wedlock birth, 5) child physical abuse, 6) health, 7) educational success. *Id* at 7.

complementary cognitive and emotional organizations of the world of the infant.” *Id.* at 12. For example only, generally mothers are better at reading the physical and emotional cues of infants, are more adapt at speaking to a child at her level, discipline differently from fathers by showing more empathy, and focus on the relationship while fathers emphasize justice and duty. *Id.* at 15. Social scientists reasonably conclude that a combination of the two approaches is more effective.

None of the studies cited in the briefs of the APA and CRO evaluate studies of children raised in opposite and same-sex households who have reached adulthood. The reason is that none exist.

Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. ... Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years.

Goodridge v. Dept. of Health, 440 Mass. 309, 798 N.E.2d 941, 979-980 (2003)(Sosman, J., dissenting).

Amici Alliance and Families Northwest also point out that there

are critical methodological flaws in most studies advocating the equivalence of homosexual parenting. Alliance Brief, pg. 18, Families NW Brief, pg. 7. Even researchers who favor same-sex marriage (and relied on by CRO) concede that “there are no studies of child development based on random, representative samples of [same-sex] families.” *Id.* (quoting Judith Stacey and Timothy Biblarz, “Does the Sexual orientation of Parents Matter?”, 66 Am. Soc. Rev. 159, 166 (2001). University of Virginia sociologist, Dr. Steven Nock, stated after reviewing hundreds of studies as an expert for the Attorney General of Canada that the studies contained at least one fatal flaw in design or execution and none were conducted according to general accepted standards of scientific research. Families NW Brief, pg. 19.

The methodological flaws of these studies suggest genuine questions of bias and result-oriented research. Given the obvious temptation to produce such studies for litigation like this, by both sides, the better course is to put little weight on this research and leave public policy-oriented fact-finding to the legislative process. In any event, debatable fact issues should not reach the Court, as in this case, on summary judgment.

Intervenors respectfully submit that the Legislature, as the creator of the institution of civil marriage, may reasonably limit marriage to a man and woman until the social science has benefited from the passage of time.

B. Response to briefs of Amicus Curiae of State Legislators.

Amici State Legislators² suggest a new interpretive model (authored by a Professor Philip Bobbitt of the University of Texas) for understanding Washington's State constitution. Brief of Amici State Legislators, pg. 2. Amici's proposal should be rejected because the employment of two interpretive models (Bobbitt's and the *Gunwall* factors) will only confuse litigants and, without offering any reason for doing so, departs from the established and principled constitutional jurisprudence of this Court.

The Bobbitt framework offers six interpretative approaches that may be used separately or in any combination by the courts.³ They closely parallel the *Gunwall* factors. Legislators Brief, pg. 2. However to the extent they differ, Amici suggest no analytical devise for determining when to follow *Gunwall* and when to rely on the Bobbitt test.

² Representative Fred Jarrett, Representative Jim Moeller, Representative Edward Murray, Representative Dave Uptegrove, Senator Debbie Regala and Senator Pat Thibaudeau

³ Bobbitt factors that include: 1) **textual** (looking to the meaning of the words of a constitution alone, as they would be interpreted by the average contemporary community member); 2) **historical** (relying on the intentions of the framers and ratifiers of a constitution and their forerunners); 3) **structural** (inferring rules from the relationships that a constitution mandates among the structures it sets up); 4) **doctrinal** (applying rules generated by prior court decisions); 5) **ethical** (deriving rules from the moral commitments of the political ethos that are reflected in a constitution); and 6) **prudential** (seeking to balance the costs and benefits of a particular interpretation).

Additionally, the *Gunwall* factors were designed to provide a principled approach to independent interpretation of state constitutional provisions similar to the federal constitution and avoid “result oriented judicial decisions, constitution shopping, courts acting as super legislatures and as an all sail, no anchor approach to state constitutional law.” *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). The Bobbitt model lacks this safeguard. It invites the courts to use any one or combination of factors when interpreting any provision of the state constitution without offering an analytical tool, such as the *Gunwall* test, for determining in a principled manner when to depart from federal case law interpreting similar federal constitutional provisions.

Amici’s application of the first Bobbitt factor, “text-based method,” illustrates the problem. After concluding that “privilege” applies to all rights, and therefore marriage, without any analysis whatsoever, Amici conclude that “one class of citizens (gay and lesbian couples) is denied the privilege made available to others.” Brief, pg. 6. Missing is any discussion of whether the characteristic that distinguishes the two classes is rationally related to the state interest furthered by the law or, alternatively, whether the classification serves a compelling state interest. Thus, the settled federal and state constitutional frameworks that safeguard

against courts usurping the role of the Legislature have no place in the Amici's proposed interpretive scheme.

While Amici are correct that "our jurisprudence concerning Article I, Section 12 is still being developed," this Court furnished a distinct and adequate method for interpreting and applying the clause independent of federal law, based on the *Gunwall* factors. It would stretch the principle of stare decisis past the breaking point to employ this new framework less than a year after deciding the *Grant County* cases.

Amici's "historical understanding" of the Privileges and Immunity Clause also departs from this Court's settled understanding of the rights covered by the clause. Amici claim the phrase is an "all-inclusive" definition that encompasses "both enumerated and unenumerated rights." Brief of Legislators, pgs. 10-11. However, in *Grant County II*,⁴ quoting from its earlier decision, *State v. Vance*, the Court explained the fundamental rights within the meaning of Privileges and Immunities Clause:

[A]s this court made quite clear early in this State's history, the terms "privileges and immunities" 'pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens

⁴ *Grant County Fire Protection Dist. No 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004).

of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, *Constitutional Limitations* (6th ed.). **By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.** *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902) (other citations omitted.)

Grant County II, 150 Wn.2d at 812-813 (emphasis added). Thus, Amici envision judicial power made possible by the Privileges and Immunities Clause that would invest in the courts the authority to make ad hoc determinations of constitutionality for any law which withheld rights or benefits to any person or group, regardless of the rationale. This contravenes the principle of separation of powers, i.e., that "[e]very presumption is in favor of the constitutionality of a legislative act, and ... in matters of classification, the legislature has a very broad discretion." *Grant County Fire Protection Dist. No. 5. v. City of Moses Lake*, 145 Wn.2d 702, 736, 42 P.3d 394 (2002) (Madsen, J. concurring/dissenting) (citations omitted.)

Amici's "constitutional ethos" is even more nebulous. Citing to the novel "Anglo-American tradition," of which there could be but one other country that fits that description, Canada, Amici refer to recent

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decisions of several provincial courts. Brief of Legislators, pg. 12. Amici fail to mention that other Anglo-legal systems, including that of Great Britain, the one whose traditions the U.S. legal system is far more directly linked, have not discovered a right for same-sex marriage. Nor does Amici explain why this Court should look to a few Canadian provinces for guidance, but ignore the Indiana Court of Appeals, for example, that recently construed its Privileges and Immunities Clause, which is nearly identical to that of Washington's, and held that the marriage limitation did not violate the Indiana Constitution including Indiana's Privileges and Immunities Clause. *Morrison v. Sadler*, 2005 WL 107151 (Ind. Ct. App. 2005).

The final arguments of Amici, the structure of the Washington's constitution, doctrinal considerations and prudential concerns, have been fully addressed by Intervenors in their opening brief. See Intervenor's Brief, pgs. 35-44 and Reply Brief, pgs. 32-35. In sum, the Court should reject the Bobbitt framework. It is unnecessary and would lead to "result oriented judicial decisions" and "constitution shopping."

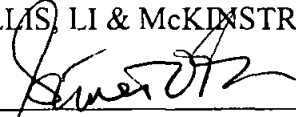
CONCLUSION

For the reasons stated above and those previously mentioned by the Appellants, the arguments of amici are without merit. The judgments of the trial courts should be set aside and Plaintiffs' claims dismissed.

RESPECTFULLY SUBMITTED this 23rd day of February, 2005.

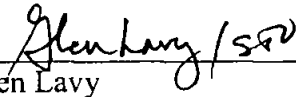
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