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SUPREME COURT OF THE STATE OF WASHINGTON *b/h*

HEATHER ANDERSEN and LESLIE CHRISTIAN, et al., Respondents,

v.

KING COUNTY, et al.
STATE OF WASHINGTON
SENATOR VAL STEVENS, et al., Appellants,

CELIA CASTLE and BRENDA BAUER, et al., Plaintiffs,

v.

STATE OF WASHINGTON, Defendant.

KING COUNTY'S ANSWER TO BRIEFS OF AMICI CURIAE

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I. INTRODUCTION

Appellant King County submits this answer to the amicus curiae briefs submitted in this matter. The amicus curiae briefs that are supportive of Respondents generally fall into two categories. The brief submitted on behalf of Representative Fred Jarrett and certain other named state legislators addresses the appropriate legal standard for evaluating claims under the Privileges and Immunities Clause of the Washington Constitution. Respondents' other amici address various policy considerations regarding same-sex marriage. This answer to the briefs of amici curiae will respond to these two categories separately.

II. ARGUMENT

A. This Court should not overrule the well-established and recently reaffirmed case law governing application of the Privileges and Immunities Clause of the Washington Constitution.

Amici Representative Fred Jarrett and certain other named state legislators (State Legislators¹) argue that this Court should establish a new paradigm for analyzing provisions of the state constitution. Such a result would require this Court to overrule *State v. Gunwall*, 106 Wn.2d 54, 720

¹ Amici refer to themselves as "State Legislators," and for simplicity this brief will do the same. However, it should be noted that these Amici constitute a small number of state legislators who were in the minority when the legislature most recently considered Washington's marriage statute. See 1998 FINAL LEGISLATIVE REPORT, 55th Leg., Reg. Sess. 11 (Wash. 1998). Having been unsuccessful in the legislative policy debate, these state legislators now look to this Court to accomplish what they did not accomplish through the legislative process.

P.2d 808 (1986), *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 428 (2004) [hereinafter *Grant County II*], and the literally hundreds of other cases that define not only the scope of the state Privileges and Immunities Clause but also the relationship between all provisions of the state and federal constitutions. Such an extreme holding is unwarranted.

- 1. Washington has a well-established body of case law defining the relationship between parallel provisions of the state and federal constitutions.**

Washington was one of the first states to develop a method for rigorous analysis of its state constitution independent of the federal constitution. See Hugh D. Spitzer, *Which Constitution? Eleven Years of Gunwall in Washington State*, 21 SEATTLE U. L. REV. 1187, 1191 (1998). Washington's early state constitutional jurisprudence was occasionally criticized as lacking sufficient rigor. See, e.g., *State v. Ringer*, 100 Wn.2d 686, 703, 674 P.2d 1240, 1250 (1983) (Dimmick, J., dissenting) (criticizing, in a pre-*Gunwall* case, the result-oriented nature of state constitutional analysis). In order to develop principled, independent state constitutional analysis, in 1986 this Court established a detailed test for determining whether a particular provision of the state constitution should be interpreted independently of the parallel federal provision. *Gunwall*, 106 Wn.2d at 61-62, 720 P.2d at 812-13. *Gunwall* established a principled

methodology for examining the history and meaning of the state constitution. See ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION – A REFERENCE GUIDE 7 (2002).

A *Gunwall* analysis continues to be the preferred method for interpreting the Washington Constitution. The State Legislators are mistaken in suggesting that this Court has moved away from using a *Gunwall* analysis as the foundation for analyzing the state constitution. See State Legislators' Brief at 4. Over the past two decades, the scope of numerous state constitutional provisions has been defined pursuant to a *Gunwall* analysis. A 1997 survey revealed that this Court cited the decision in 108 opinions, and the Court of Appeals cited the decision in 96 opinions. See Spitzer, *supra*, at 1196. To date, at least 449 Washington court opinions have cited *Gunwall*.²

2. This Court has recently addressed the scope of the state Privileges and Immunities Clause through a detailed *Gunwall* analysis.

In their attempt to discount *Gunwall* the State Legislators disregard the recent *Grant County* decision, which relied on an extensive *Gunwall* analysis to determine the scope of the state Privileges and Immunities Clause when compared to the parallel provision of the federal constitution. See *Grant County II*, 150 Wn.2d at 805-11, 83 P.3d at 425-28. *Grant*

County II defines the scope of the state Privileges and Immunities Clause and outlines the extent to which that clause applies more broadly than the parallel provision of the federal constitution. *See County Opening Brief* at 40-45; *County Reply Brief* at 22-34.

3. **If this Court were to reconsider *Grant County II*, this Court should accept Amici State Legislators' earlier argument that Washington's Privileges and Immunities Clause should be interpreted like its counterpart in the Indiana Constitution.**

The State Legislators appeared as Amici Curiae in proceedings below and urged the court to follow Indiana judicial interpretation of the Privileges and Immunities Clause of the Indiana Constitution. CP ___³ *Brief of Amici Curiae Rep. Fred Jarrett et al.* at 9-10).⁴ The State Legislators did not suggest that Indiana jurisprudence should be followed based on a specific result, but instead they focused on the rigor of

² A Westlaw search on February 20, 2005, revealed 449 opinions citing to *Gunwall*.

³ The *Brief of Amici Curiae Rep. Fred Jarrett et al.*, filed in the King County Superior Court on June 25, 2004, as subnumber 132, has been designated as a clerk's paper in this matter, but the clerk has not yet assigned pagination.

⁴ Subsequent to Amici State Legislators' submission of their brief in the trial court, the Indiana court specifically rejected a claim that the Indiana Privileges and Immunities Clause requires the state to allow same-sex marriage. *See Morrison v. Sadler*, 821 N.E.2d 15, 21-31 (Ind. Ct. App. 2005). In their briefing to this Court, Amici no longer urge this Court to follow Indiana's constitutional analysis. King County submits that this Court is still properly informed by Amici's earlier argument supporting Indiana's state constitutional jurisprudence. Although parties to a proceeding may have some ability to change their legal positions during the course of a proceeding, Amici come to the court in a special status. Amicus curiae means "friend of the court" not "friend of a party." *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063-64 (7th Cir. 1062); *United States v. Mich.*, 940 F.2d 143, 164-65 (6th Cir. 1991). The scholarly analysis of the significance of Indiana jurisprudence should still be informative to this Court.

Indiana's constitutional analysis. *Id.*

Indiana is an instructive source of authority for interpreting the Privileges and Immunities Clause of the Washington Constitution. The Indiana Privileges and Immunities Clause served as the model for the parallel provisions of the Oregon and Washington Constitutions. UTTER & SPITZER, *supra*, at 26-27; *see also State v. Smith*, 117 Wn.2d 263, 283 & n.1, 814 P.2d 652, 661-62 & n.1 (1991) (Utter, J., concurring). The Washington Privileges and Immunities Clause is nearly identical to that found in the Indiana Constitution. The Privileges and Immunities Clause of the Indiana Constitution provides as follows:

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

IND. CONST. art. I, § 23. The parallel provision in the Washington Constitution is substantively the same.

Special privileges and immunities prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

WASH. CONST. art. I, §12. Other than changing the voice from active to passive and adding the references to corporations, the Washington Constitution simply copies the Privileges and Immunities Clause from the Indiana Constitution. The addition of language regarding corporations

provides additional insight into the historical basis and intent of this provision. The explicit reference to corporations serves to limit, not expand, the Washington Privileges and Immunities Clause. *See* County Opening Brief at 42-44; County Reply Brief at 26-31.

In Indiana, the court has recently and clearly considered a claim that the state Privileges and Immunities Clause requires Indiana to allow same-sex marriage. *Morrison v. Sadler*, 821 N.E.2d 15, 21-31 (Ind. Ct. App. 2005). *Morrison* addressed the issue of whether Indiana's statutory limitation of marriage to opposite-sex couples violates the state Privileges and Immunities Clause. *Morrison*, 821 N.E.2d at 21-31. The Indiana court held the Indiana Constitution does not require the government to allow same-sex marriage. *Id.* at 35.

4. This Court should not abandon the *Gunwall* approach to state constitutional analysis.

Although the State Legislators acknowledge that this Court may use various methods for interpreting the state constitution, presumably including *Gunwall*, they suggest approaching the state Privileges and Immunities Clause using a framework developed by Philip Bobbitt of the University of Texas. *See* State Legislators' Brief at 1-5. The Bobbitt method calls for consideration of the following six interpretive approaches: (1) textual; (2) historical; (3) structural; (4) doctrinal; (5)

ethical; and (6) prudential. *See* Philip Bobbitt, CONSTITUTIONAL INTERPRETATION 12-13 (1991).

Abandoning *Gunwall* and its entire progeny of cases is simply unwarranted. The underlying purpose of *Gunwall* was to allow the state to develop state constitutional jurisprudence that is independent from the federal constitution. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 777, 776 (1988). Over the past two decades, Washington courts have developed that jurisprudence through a body of literally hundreds of cases that interpret the state constitution pursuant to a *Gunwall* analysis. Adopting the Bobbitt method would call Washington's entire state constitutional jurisprudence into question.

Moreover, even if this Court were inclined to abandon its *Gunwall* jurisprudence, the Bobbitt analytical method is not an appropriate replacement. The lack of acceptance of the Bobbitt method is remarkable. It appears that no Washington court and very few non-Washington courts have even cited to Bobbitt's method. Although Bobbitt is cited in the academic community, those citations are often to criticism of Bobbitt's method. *See, e.g.*, J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994).

5. Overruling well-established case law and adopting Amici's proposed method of state constitutional analysis would not lead to a different interpretation of the state Privileges and Immunities Clause.

Even if this Court were to accept the invitation to overrule well-established case law and adopt a new method of state constitutional analysis, the proposed alternative would not lead to a different result. At least with regard to the issue presented in this matter, the result of the application of the Bobbitt method is not substantially different from that of *Gunwall*. As the State Legislators acknowledge, Bobbitt's modes of analysis involve substantially the same inquiry as a *Gunwall* analysis. *See* State Legislators' Brief at 3. Bobbitt calls for consideration of the state constitution's text, as do *Gunwall* factors 1 and 2; its history, as do *Gunwall* factors 3 and 4; its structure, as does *Gunwall* factor 5; prior doctrine, as does *Gunwall* factor 3; ethical concerns, as does *Gunwall* factor 6; and prudential considerations, as does *Gunwall* factor 6. *See id.* Bobbitt's six modes of analysis correspond closely to the six *Gunwall* factors. In this matter, there is no indication that a Bobbitt analysis would lead to a different result.

B. Amici do not establish that Washington lacks a sufficient basis to maintain the limitation on marriage to opposite-sex couples.

Amici other than the State Legislators offer various policy arguments regarding the consequences of limiting marriage to opposite-sex couples.

This Court need not evaluate each specific policy argument supporting or opposing Washington's long-standing marriage statute. Rather, this Court's role is to determine whether a legally sufficient basis supports the legislative decision at issue here. When reviewed as a whole, the various amicus curiae briefs submitted in this matter support the determination that there is a sufficient basis for Washington's marriage statute.

1. Washington's marriage statute should be reviewed under the rational basis standard.

Washington's marriage statute should be reviewed for a rational basis because it does not burden a fundamental right or involve a suspect classification. *See* County Opening Brief at 22-30; *Paulson v. County of Pierce*, 99 Wn.2d 645, 652, 664 P.2d 1202, 1207, *appeal dismissed*, 464 U.S. 957 (1983).

When reviewed as a whole, the briefs filed by Amici Curiae demonstrate that the rational basis test is satisfied here. Under rational basis review, this Court does not need to determine whether the rational bases set forth for enacting the legislation are persuasive or whether Washington made a good policy choice when it established the state's marriage statute. *See In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004) (holding that the test is not whether the rationale for the legislation is persuasive). This Court does not need to determine what the legislature

actually considered when enacting the statute. *See Seeley v. State*, 132 Wn.2d 776, 795-96, 940 P.2d 604, 613-14 (1997). Instead, it is Respondents' burden to prove, *beyond a reasonable doubt*, that there are *no conceivable grounds* that *could* support the constitutionality of the marriage statute. *Id.* In its prior briefing, King County has addressed how Respondents cannot meet this burden. *See* County Opening Brief at 31-38; County Reply Brief at 14-19. The briefs submitted by Amici do not support a different determination.

2. The information offered by Amici should not challenge the determination that there is a sufficient basis for Washington's marriage statute.

This Court need not agree that all the bases for Washington's marriage statute are consistent with good public policy or even that they are factors the legislature actually considered in adopting Washington's marriage statute. The legal test is merely whether there are conceivable grounds that could support the marriage statute. For example, Amici Marriage Law Foundation argues that there is a "private welfare purpose" to marriage that is consistent with a definition that limits marriage to opposite-sex couples because it relates to the children that the opposite-sex union regularly produces. *See* Brief of Amicus Curiae of Marriage Law Foundation at 7-13.

This basis was recently recognized by the Indiana Court of Appeals as a sufficient basis for that state's limitation of marriage to opposite-sex couples.

One of the State's key interests in supporting opposite-sex marriage is not necessarily to encourage and promote "natural" procreation across the board and at the expense of other forms of becoming parents, such as by adoption and assisted reproduction; rather, it encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly. . . . The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly.

Morrison, 821 N.E.2d at 25. The court considered this rational basis in finding that the plaintiffs failed to meet their burden to demonstrate that the marital procreation justification for limiting marriage to opposite-sex couples was manifestly unreasonable or arbitrary. *Id.* at 23.

In the present case, other Amici, including Families Northwest, argue that there is a lack of reliable research on the outcomes of children raised by same-sex couples and that as a result, the legislature could have reasonably chosen to wait to see the results of such studies before redefining marriage to include same-sex couples. *See* Brief of Amicus Curiae Families Northwest at 8. Families Northwest also argues that redefining marriage will have a dramatic effect on the next generation's

attitude with regard to marriage and the importance of mothers and fathers in raising children. *Id.* at 17-18. Amici Alliance for Marriage argues that there is a rational basis for limiting marriage to opposite-sex couples related to the unique and complimentary roles the two sexes have in raising a child. *See* Brief of Amicus Curiae Alliance for Marriage, Inc. at 3-17. Again, even if this Court were not to agree with the public policy reasoning behind these rational bases, Washington's marriage statute should still be upheld. The rational bases previously set forth by King County and the other appellants, and also set forth by Amici, clearly demonstrate that there are conceivable grounds that provide a sufficient basis for Washington's marriage statute. Respondents cannot satisfy their burden of proving the contrary beyond a reasonable doubt.

Amici Curiae's suggestion that some legislators might have been motivated in part by legally insufficient motives does not support a conclusion that Washington's marriage statute lacks a rational basis. As the court recognized in *Morrison*, there are limitations to the bases on which the legislature could have relied in passing the state marriage statute. Moral disapproval of homosexual relationships is not valid as a sole justification for limiting marriage to opposite-sex couples. *See Morrison*, 821 N.E.2d at 20-21 (citing *Lawrence v. Texas*, 539 U.S. 558, 585, 123 S. Ct. 2472, 2487-88, 156 L. Ed. 2d 508, 530 (2003) (O'Connor,

J., concurring)). In *Lawrence*, Justice O'Connor noted that there was no basis other than moral disapproval for the Texas's sodomy statute. 539 U.S. at 585, 123 S. Ct. at 2487-88, 156 L. Ed. 2d at 530. Justice O'Connor explicitly contrasted the lack of a basis for Texas's sodomy statute with laws precluding same-sex marriage, and she noted that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." 539 U.S. at 585, 123 S. Ct. at 2488, 156 L. Ed. 2d at 530.

Respondents' Amici note that there were statements made during the debate on the state Defense of Marriage Act (state DOMA) that may fit within this category of impermissible justification.⁵ See Amici Curiae Brief of Labor Organizations at 15-16. However, such statements do not justify overturning the marriage statute unless the moral disapproval of homosexual relationships was the *sole* justification for limiting marriage to opposite-sex couples. As discussed above, the other Amici, as well as other appellants, demonstrate that there were rational bases separate from any moral disapproval of homosexual relationships upon which the legislature could have relied to enact the state DOMA. The fact that *some*

⁵ As King County has previously addressed, given that Washington's marriage law, which precludes same-sex marriage, originated in 1854, claims regarding the motivations of some legislators in 1998 could not inform an understanding of the constitutionality of that law. See County Reply Brief at 15.

legislators may have indicated a moral disapproval of the relationships as one basis for *their* support of the legislation does not lead to the conclusion that the law should be overturned. *See Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 565, 800 P.2d 367, 372 (1990) (rational basis for a legislative decision need not have actually motivated the legislature's decision).

Where a challenged statute does not burden a fundamental right or involve a suspect classification, the party challenging the statute has the burden of proving it unconstitutional beyond a reasonable doubt. *See State v. Heckel*, 143 Wn.2d 824, 832, 24 P.3d 404, 408, *cert. denied*, 534 U.S. 997 (2001). The judiciary should disturb the legislation only if there are no conceivable facts to support it. *See Seeley*, 132 Wn.2d at 795-96, 940 P.2d at 613-14. As King County and the other appellants demonstrated in their opening and reply briefs, and as Amici now demonstrate in their briefs, the legislature had a rational basis to reaffirm existing law by enacting the state DOMA. The test is not whether the rationales are persuasive to this Court, but whether they satisfy a minimum level of rationality. *See Kandu*, 315 B.R. at 145. Washington's marriage statute satisfies this minimal test and should be upheld.

C. Evidence of benefits conveyed or denied based on marital status does not lead to the conclusion that Washington's marriage statute should be invalidated.

Several of Respondents' Amici discuss benefits that they allege same-sex couples are presently denied as a result of their inability to marry. With respect to those benefits that are not based on Washington law, there is no remedy available to same-sex couples in this case. For those benefits that are based on Washington law, even if this Court were to find an unconstitutional denial of benefits to same-sex couples, this Court should not invalidate Washington's marriage statute. It should instead fashion a remedy that addresses any identified constitutional problem while also preserving the legislative intent behind Washington's long-standing marriage statute.

1. There is no remedy in this case for benefits not based on Washington law.

Respondents cannot get relief through these proceedings for many of the benefits Respondents' Amici attribute to marriage. For example, some Amici argue that same-sex couples are subject to inequalities in social security benefits, including those available to a surviving spouse. *See* Brief of Amici Curiae Pride Foundation, et al. at 28-29; Amicus Curiae Brief of Elder Rights Organizations in Support of Respondents/Plaintiffs at 19. Even if Respondents could obtain a Washington marriage license,

individuals in same-sex relationships would still be ineligible for the social security benefits to which a “spouse” is entitled under federal law. The federal Defense of Marriage Act (federal DOMA) provides that for purposes of all federal laws “‘marriage’ means only a legal union between one man and one woman as husband and wife,” and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7 (2000). Because federal law governs social security, same-sex partners would be prevented from receiving spousal social security benefits even if they were allowed to marry in Washington.

Other Amici argue that same-sex couples are denied intangible benefits that marriage can bring including greater feelings of self-worth, purpose, happiness, stability and commitment between partners. *See* Amicus Curiae Brief of Children’s Rights Organizations in Support of Respondents at 20; Amicus Curiae Brief of American Psychological Association at 27-28. As Respondents demonstrate in the affidavits filed with the trial court, these benefits are not necessarily denied to same-sex couples as a result of their inability obtain a marriage license. It is the individuals and the couple, opposite-sex or same-sex, that bring intangible benefits such as stability and commitment to a relationship. The ability to marry would not confer these intangible benefits on same-sex couples.

Intangible benefits and those benefits conferred by federal law, such as social security, could not be conferred on same-sex couples by a Washington marriage license. These are not benefits that this state, either through its legislature or its courts, can grant. Arguments regarding these benefits should be dismissed because there is no remedy this Court can grant that will make these benefits available to Respondents.

2. **If this Court were to find that benefits of marriage are unconstitutionally denied to same-sex couples, it should at most order the remedy that is most consistent with legislative intent in adopting Washington's marriage statute.**

Respondents' Amici discuss a number of benefits under Washington law that are conferred on married couples, such as the presumption of parentage under RCW 26.26; medical decision-making for a spouse under RCW 7.70.065; disposition of remains under RCW 68.50.160; and disposition of property after death under RCW 11.04.015. *See* Amicus Curiae Brief of Children's Rights Organizations in Support of Respondents at 16-19; Amicus Curiae Brief of End of Life Organizations in Support of Respondents/Plaintiffs at 4-8, 12-15, 15-19. These Amici Curiae do not propose that these rights be made available to same-sex couples through the individual statutory schemes that govern the benefits. Instead, they suggest that the entire marriage statute should be rejected.

This extreme result would be contrary to the legislature's clear intent to limit marriage in Washington to opposite-sex couples.

The question of whether Respondents are entitled to certain specific benefits is not properly before this Court. Respondents simply asked for a declaration that Washington's marriage statute is facially unconstitutional and that they be allowed to marry. As previously discussed, this argument should be rejected. Respondents have not raised the claim that they might be entitled to some other relief that would allow them to receive the tangible benefits of marriage without actually being married. Accordingly, that issue is not before this Court, and Respondents' claim should simply be rejected. *See also* County Reply Brief at 38-40.

If this Court were to find a constitutional violation based on the denial of certain benefits and were to proceed to order a remedy in this case, this Court should conduct a severability analysis to determine what the legislature would have intended in light of this Court's constitutional holding. *United States v. Booker*, 125 S. Ct. 738, 756-64 (2005) (citing *Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Communications Comm'n*, 518 U.S. 727, 767, 116 S. Ct. 2374, 2397, 135 L. Ed. 2d 888, 917-18 (1996) (plurality opinion)). The U.S. Supreme Court conducted such an analysis recently in its review of the Federal Sentencing Guidelines. *Id.* In *Booker*, the Court held that the Guidelines were

unconstitutional based on the Court's finding that the Sixth Amendment requires juries, not judges, to find facts necessary to support a sentence exceeding the maximum authorized by statute. *Id.* at 756. The Court then looked at two remedial approaches that implemented its constitutional finding to determine which was more compatible with the intent of Congress as embodied in the 1984 Sentencing Act. *Id.* at 757. The Court found that both of the approaches would significantly alter the system. *Id.* One approach would retain the Sentencing Act as written and engraft onto the existing system a requirement related to jury trials. *Id.* The second approach would make the Guidelines advisory, while maintaining a strong connection between the sentence imposed and the offender's real conduct. *Id.* The Court chose this second remedy in part because it found that the connection to the offender's real conduct was important to the increased uniformity of sentencing that Congress intended with the Guidelines. *Id.* The Court offered additional analysis to explain why it believed that Congress would have preferred the second remedy over the first, and why Congress would have preferred excision of the Act's mandatory language to invalidation of the entire Act. *Id.* at 758-59.

A similar analysis is appropriate in the present case. If this Court were to find that same-sex couples are unconstitutionally denied state benefits currently granted to opposite-sex couples, it should order the least


drastic remedy that is consistent with the legislature's intent. The legislative intent behind Washington's marriage statute is clear. Instead of invalidating Washington's marriage statute or defining marriage in a way that is contrary to the legislature's intent, this Court could order a remedy that would allow same-sex couples to get benefits that are presently only available to married couples.⁶ This result would allow any constitutional violation to be remedied but retain the clear legislative intent to define marriage as a union between one man and one woman.

III. CONCLUSION

Washington's long-standing marriage law is supported by a legally sufficient basis and should not be overturned.

DATED this 23rd day of February, 2005.

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⁶ Some of Respondents' Amici argue against civil unions stating that same-sex couples will face obstacles to portability because of their treatment by other states and private parties within those states. Amici Curiae Brief of Legal Marriage Alliance of Washington, et al. at 12-19. This issue would exist even if same-sex couples were allowed either to marry or to form civil unions in Washington. The federal DOMA provides that no state shall be required to give effect to any relationship between persons of the same sex that is treated as a marriage under another state's law. 28 U.S.C. 1738C (2000).