

No. 75934-1
Consolidated with No. 75956-1

SUPREME COURT OF THE STATE OF WASHINGTON

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 RESPONSE TO SUPPLEMENTAL BRIEF
OF RESPONDENTS CASTLE, ET AL.**

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This Court should reject Castle's request to modify the well-established rule that the judiciary should not disturb legislation subjected to rational basis review unless there are no conceivable facts to support it. *See Seeley v. State*, 132 Wn.2d 776, 795-96, 940 P.2d 604 (1997). This issue has been well briefed, but a few points should be highlighted here.

1. Castle's allegations regarding legislative prejudice are irrelevant because they do not involve the Act that adopted Washington's ban on same-sex marriage.

Castle has never established that Washington's prohibition on same-sex marriage was adopted out of prejudice. Instead, Castle's argument is based on the claim that some legislators were motivated by prejudice when the legislature adopted the Defense of Marriage Act ["DOMA"] in 1998. Motivation of these few legislators in 1998 is irrelevant because DOMA did not render same-sex marriage illegal in Washington;¹ the Washington rule limiting marriage to opposite-sex couples originated in common law and has been recognized in statute since 1854. *See Singer v. Hara*, 11 Wn. App. 247, 250, 522 P.2d 1187 (1974). Indeed, the legislative record from the adoption of DOMA demonstrates that the

¹ Washington's adoption of DOMA only affected one change in the law. It exercised a right conferred by the federal DOMA, which had been adopted in 1996, for Washington not to recognize same-sex marriages from other jurisdictions. Absent the adoption of the Washington DOMA, same-sex couples would still not have been able to marry in Washington, but Washington might have been compelled to recognize same-sex marriages from other jurisdictions.

legislators without exception understood that same-sex marriage was illegal with or without the passage of DOMA. Given that Washington's marriage statute that limits marriage to opposite-sex couples originated in 1854, claims regarding the motivations of some legislators in 1998 are irrelevant. Castle has offered no evidence that the common law or the 1854 territorial legislature were motivated by anti-gay prejudice.

2. Castle misstates the test for review of legislative action.

Even if Washington's adoption of DOMA had been the basis for the current limitation on marriage, the legislation should still be upheld under the rational basis standard. Castle asserts that the U.S. Supreme Court has established that "if there is any indication that the challenged legislation was motivated even in part by discrimination, the burden shifts to the State" See Supplemental Brief at 1. This assertion is incorrect.

The cases relied upon by Castle are simply inapplicable. None of these cases involve review of legislative policy making, which is entitled to the highest level of deference. Instead, all of the cases discussed by Castle involve review of administrative or quasi-judicial decisions.² In

² *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (reviewing an employer's decision regarding which employee to promote); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (regarding an employer's decision not to renew an annual employment contract); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (considering a challenge to a site-specific rezoning decision); *Cook v. Babbitt*, 819 F. Supp. 1 (1993) (considering a challenge to an administrative regulation).

contrast, review of legislative policymaking is entitled to substantially more deference. *See State v. Oakley*, 117 Wn. App. 730, 736, 72 P.3d 1114 (2003) (holding that the “high burden” of rational basis review “recognizes a degree of deference to the legislature, which is a co-equal branch of government sworn to uphold the constitution and presumed to have considered the constitutionality of its enactments”), *rev. denied*, 151 Wn.2d 1007, 87 P.3d 1185 (2004). Further, cases relied upon by Castle regarding reduced judicial deference are also inapplicable because they present situations warranting heightened scrutiny, such as distinctions based on race or gender. In contrast to claims regarding race and gender, the law is well established that claims regarding sexual orientation should be reviewed under the traditional rational basis test. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (holding that “all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class” and have applied rational basis review), *cert. denied*, 125 S. Ct. 869 (2005).

Nevertheless, Castle argues that the U.S. Supreme Court has suggested that claims involving sexual orientation should be reviewed pursuant to a standard more rigorous than traditional rational basis review. *See* Supp. Brief at 4-6 (discussing *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 508 (1996)). Yet, *Lofton* rejected the notion that *Lawrence* and *Romer* contemplate something other than traditional rational basis review for claims involving sexual orientation. 358 F.3d at 817, 826-27. This Court should do the same.

Castle's reliance on *Romer* shows the error in their argument. In *Romer*, the Court found that the challenged legislation was motivated *only* by "animus toward the class it affects." 517 U.S. at 632, 116 S. Ct. at 1627. *Romer* then held that legislation should be struck down if it was based *solely* on prejudice or improper purpose. This is not a new rule. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 232, 105 S. Ct. 1916, 85 L. Ed. 222 (1985); *State v. Brayman*, 110 Wn.2d 183, 204-05, 751 P.2d 294 (1988). Conspicuously absent in the instant case is any allegation that Washington's marriage statute was adopted based solely on prejudice.

3. Even under more rigorous review, Washington's marriage statute should be upheld.

Washington's marriage statute should be upheld even under a more rigorous inquiry into whether the statute was adopted based on prejudice rather than the rational bases that Respondents have discussed in their previous briefs. Castle lacks any admissible evidence of prejudice. Castle suggests that the determination of whether the legislature was motivated by prejudice should be determined based on statements of certain

legislators. This Court has repeatedly held that statements of individual legislators do not establish legislative intent. *See, e.g., Convention Ctr. Coalition v. City of Seattle*, 107 Wn.2d 370, 375, 730 P.2d 636 (1986). Moreover, in all of the briefing in this case, Castle has only alleged that a handful of legislators made statements indicating prejudice.³ Almost 70 percent of the legislators voted for the DOMA, so even if these votes of which Castle complains were not considered, the legislation would have passed. Finally, that Washington's marriage statute is based on interests other than prejudice is shown by considering the overwhelming tide of decisions (ranging from President Clinton, who signed DOMA, to the voters of the numerous states that have adopted marriage amendments) that are consistent with the Washington marriage statute. The fact that almost every other decision-maker made the same policy judgment as is being attacked here serves to reinforce the conclusion that there is a rational, non-prejudicial basis for Washington's marriage statute.

DATED this 23rd day of May, 2005.

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³ Many of the legislative statements regarding prejudice were made by opponents of the legislation. Rather than addressing the various bases for the legislation, the opponents attempted to label the proponents as being motivated by prejudice. Of course, these statements do nothing to establish the motivation of those who voted for the legislation.

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct:

That on the date indicated below, I caused to be served via Legal Messenger a copy of KING COUNTY'S RESPONSE TO SUPPLEMENTAL BRIEF OF RESPONDENTS CASTLE, ET AL., the document to which this DECLARATION OF SERVICE is attached, on the following parties:

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