

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.

REPLY BRIEF OF APPELLANT KING COUNTY

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NORM MALENG  
King County Prosecuting Attorney

DARREN E. CARNELL, WSBA #25347  
JANINE E. JOLY, WSBA #27314  
KRISTOFER J. BUNDY, WSBA #19840  
Senior Deputy Prosecuting Attorneys  
Attorneys for Appellant King County  
King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9015

ORIGINAL

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## I. INTRODUCTION

King County offers this reply to the Brief of Respondents Castle, et al. [hereinafter Castle Brief] and the Brief of Respondents filed on behalf of Heather Andersen et al. [hereinafter Andersen Brief]. Castle and Andersen fail to acknowledge the unprecedented nature of the superior court decisions at issue here. Long-standing Washington statutes impose numerous conditions on individuals wishing to marry, including that they not marry someone of the same gender. These rules are consistent with almost all other states.

King County respectfully urges this Court to follow the long line of cases that support allowing the Washington legislature to make the policy decision regarding what limitations to impose on marriage.

## II. STATEMENT OF THE CASE

King County, in its opening brief, provided context for the legal issues presented in this case by offering an overview of the history of the law regarding marriage in Washington and other jurisdictions. *See* Brief of Appellant King County [hereinafter County Opening Brief] at 4-15. Neither Andersen nor Castle dispute, in any significant way, King County's statement of the case.

Andersen incorrectly suggests that Washington's limitation on marriage to opposite-sex couples originated with the state Defense of

Marriage Act in 1997. *See, e.g.*, Andersen Brief at 14 & n.2. This is incorrect. The prohibition on same-sex marriage originated at common law and has existed in Washington since the inception of territorial law in 1854. *See* County Opening Brief at 5-7 (outlining the legal development of the limitations on marriage).<sup>1</sup>

Beyond Washington, the trend has been to continue to limit marriage to opposite-sex couples. New York recently added another case to the list of decisions rejecting constitutional challenges to prohibitions on same-sex marriage. *See Shields v. Madigan*, 783 N.Y.S.2d 270, 276-77 (N.Y. Sup. Ct. 2004). Moreover, in November of 2004 same-sex marriage was prohibited through state constitutional amendments that passed by large margins in eleven states. *See* James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4.

### III. REPLY ARGUMENT

#### A. **The judiciary should defer to the legislative process regarding the regulation of marriage.**

King County, in its opening brief, described the high standard that must be satisfied when challenging the constitutionality of a statute. *See* County Opening Brief at 16-17. The high burden placed on those

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<sup>1</sup> Respondents seem to suggest that their constitutional claim is strengthened by the adoption of the state DOMA. The legal significance of the legislature's adoption of DOMA is addressed in the legal argument below. *See infra* p. 15.

challenging duly-enacted statutes “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.” *See State v. Oakely*, 117 Wn. App. 730, 736, 72 P.3d 1114, 1118 (2003), *rev. denied*, 151 Wn.2d 1007, 87 P.3d 1185 (2004). Neither Andersen nor Castle addressed this issue. Indeed, courts must “construe a statute as constitutional if at all possible.” *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939, 946 (2004). As is outlined in King County’s opening brief and below, it is more than “possible” to construe King County’s marriage statute as being constitutional.

**B. The trial courts erred in ruling that federal case law supports a claim that Washington’s marriage statute violates the Washington Constitution.**

The King County Superior Court held that federal case law required states to allow same-sex marriage. *See* County Opening Brief at 15-16 (discussing the basis for the King County decision). The Thurston County Superior Court also based its decision on federal case law. *See Castle v. State*, No. 04-2-00614-4, slip op. at 25, 2004 WL 1985215, at \*12 (Thurston County Super. Ct. Sept. 7, 2004).<sup>2</sup>

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<sup>2</sup> The Thurston County court also ruled based on the state constitution. The state constitutional analysis is discussed below. *See infra* pp. 20-38.

**1. The United States Constitution does not require states to allow same-sex marriage.**

In its opening brief, King County outlined the authority that establishes that the federal constitution does not require states to allow same-sex marriage. *See* County Opening Brief at 18-19. In response to this clear line of authority, Andersen simply asserts, without any argument or citation to authority, that there is “no dispositive federal law on the question raised here . . . .” *See* Andersen Brief at 18. This statement is incorrect. *See, e.g., Baker v. Nelson*, 291 Minn. 310, 313, 191 N.W.2d 185, 187 (1971) (holding that Minnesota’s prohibition on same-sex marriage violates neither the federal Equal Protection Clause nor the federal Due Process Clause), *appeal dismissed*, 409 U.S. 810 (1972);<sup>3</sup> *see also* County Opening Brief at 18-19 (discussing numerous federal and state cases that reject the claim that the U.S. Constitution requires states to allow same-sex marriage). In fact, cases interpreting the federal constitution are without exception – not one of these cases holds that the federal constitution conveys a right to same-sex marriage. It is remarkable

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<sup>3</sup> In *Baker*, the U.S. Supreme Court dismissed plaintiff’s petition for a writ of certiorari based on the determination that there was no federal question. 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); *see also Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036, 1039 n.2 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982). This type of dismissal is a final determination on the merits. *See Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745, 747 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981) (citing *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S. Ct. 2281, 2289, 45 L. Ed. 2d 223, 236 (1975)).

that, even with an issue as actively disputed as this, all federal authority on this issue is unanimous.

While Andersen simply ignores case law rejecting a federal constitutional right to same-sex marriage, Castle at least attempts to distinguish some of the federal authority, but that effort falls short. *See* Castle Brief at 40-41. Castle ignores the most recent federal case on this issue, which King County had discussed in its brief. *See In re Kandou*, 315 B.R. 123 (Bankr. W.D. Wash. 2004). In *Kandou*, the court considered a challenge to the federal Defense of Marriage Act [hereinafter DOMA], which limits marriage to opposite sex-couples for purposes of federal law. *Id.* at 130-31. The court considered the full range of arguments supporting same-sex marriage and rejected all of these arguments. The court held that same-sex marriage does not constitute a fundamental right; that lesbians and gay men do not constitute a suspect class; that the DOMA does not constitute a classification according to gender; and that the federal DOMA satisfies rational basis review. *Id.* at 135-148.

Castle does attempt to discredit some of the cases rejecting federal constitutional claims, but that effort fails. Castle suggests, in a summary fashion, that *Baker* has effectively been overruled. *See* Castle Brief at 40. There is no basis for this suggestion. In fact, courts have properly continued to rely on *Baker*. *See, e.g., Standhardt v. Super. Ct. ex. rel.*

*County of Maricopa*, 206 Ariz. 276, 285 n.14, 287, 77 P.3d 451, 460 n.14, 462 (Ariz. Ct. App. 2003), *rev. denied* (Ariz. May 25, 2004); *see also Adams*, 486 F. Supp. at 1124.

Indeed, not only does every case that specifically addresses the issue find that the federal constitution does not support a right to same-sex marriage, but recent federal cases on related issues support the same determination. As support for their contention that there is a constitutional right to same-sex marriage, Andersen and Castle rely extensively on the criminal case *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 2003). *Lawrence* includes no such holding. *See County Opening Brief* at 25-26 (addressing fully the applicability of *Lawrence*). The U.S. Supreme Court specifically noted that the case was not about “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>4</sup> *Lawrence*, 539 U.S. at 578, 123 S. Ct. at 2484, 156 L. Ed. 2d at 525. *Lawrence* did not in any way rule on

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<sup>4</sup> Instead, Justice O’Connor specifically dispelled any notion that *Lawrence* supported a constitutional entitlement to same-sex marriage. *See Lawrence*, 539 U.S. at 585, 123 S. Ct. at 2487-88, 156 L. Ed. 2d at 530 (O’Connor, J., concurring).

[That Texas’s sodomy law] as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations--the asserted state interest in this case--other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

*Id.*

the very public institution of marriage, and the decision did not in any way establish a constitutional right to same-sex marriage.

In sum, case law interpreting the U.S. Constitution is clear and without exception. There is no federal constitutional right to same-sex marriage.

**2. Respondents' analogy to *Loving v. Virginia*, and its progeny, is misplaced.**

Both Andersen and Castle rely heavily on *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1823-24, 18 L. Ed. 2d 1010, 1018 (1967). As set forth in King County's opening brief, this reliance on *Loving*, as an attempt to establish a constitutional right to same-sex marriage, has been repeatedly rejected. Reliance on *Loving* is similarly misplaced here.

*Loving* arose in a remarkably different historical context. The anti-miscegenation law that was struck down in *Loving* had abrogated the common law rule of marriage, which allowed interracial marriage, and was adopted as part of a systematic effort to discriminate against people of color. See, e.g., *Baker v. Vt.*, 170 Vt. 194, 214 n.13, 744 A.2d 864, 880 n.13 (1999). *Loving* also arose at a time when Virginia stood as one of the last vestiges of a system of discrimination. The long-standing trend was to repeal such laws, and most states had done so. See *Loving*, 388 U.S. at 6 n.5, 87 S. Ct. at 1820 n.5, 18 L. Ed. at 1014 n.5. In the instant matter, the

trend is in the opposite direction. Same-sex marriage is almost uniformly prohibited. Many states reaffirmed such prohibitions in the late 1990s, and in the last general election, eleven states adopted constitutional prohibitions on same-sex marriage.

Courts have repeatedly recognized that *Loving* does not support a right to same-sex marriage. See County Opening Brief at 20-22; see also *In re Kandu*, 315 B.R. at 142-43 & n.8; *Standhardt*, 206 Ariz. at 283, 77 P.3d at 458; *Dean v. D.C.*, 653 A.2d 307, 362-63 & n.2 (D.C. 1995) (Steadman, J., concurring); *Baker*, 291 Minn. at 314, 191 N.W.2d at 187; *Baker*, 170 Vt. at 214 n.13, 744 A.2d at 880 n.13; *Singer v. Hara*, 11 Wn. App. 247, 253, 522 P.2d 1191, rev. denied, 84 Wn.2d 1008 (1974). Even decisions that have supported claims brought by same-sex couples have rejected the application of *Loving* in such claims. *Baker*, 170 Vt. at 214 n.13, 744 A.2d at 880 n.13.

Instead of challenging a law that was created for the specific purpose of discrimination, the instant case challenges a law that reflects the long-standing definition of marriage. *Loving* is in apposite.

**3. There is no fundamental right to same-sex marriage.**

Perhaps the core issue in this case is whether the constitution contemplates a fundamental right to “same-sex marriage.” Case law establishes that marriage, as that institution is and has always been

defined, constitutes a fundamental right. Respondents' attempt to expand this long-standing definition of marriage to include same-sex relationships should be rejected.

Respondents suggest that a line of cases involving *opposite-sex* marriage should be extended to support a fundamental right to *same-sex* marriage. Andersen Brief at 17; Castle Brief at 22-23 & n.11 (citing *Turner v. Safley*, 482 U.S. 78, 94-100, 107 S. Ct. 2254, 2265-67, 96 L. Ed. 2d 64, 83-86 (1987) (holding that prison inmates may not be prohibited from marrying); *Zablocki v. Redhail*, 434 U.S. 374, 390-91, 98 S. Ct. 673, 683, 54 L. Ed. 2d 618, 633 (1978) (holding that the right to marry may not be denied based on failure to pay child support); *Loving*, 388 U.S. at 11-12, 87 S. Ct. at 1823-24, 18 L. Ed. 2d at 1018 (holding that interracial marriage may not be prohibited); *Perez v. Lippold*, 32 Cal. 2d 711, 731-32, 198 P.2d 17, 29 (1948) (holding that interracial marriage may not be prohibited)).

Consistent with the requirement that fundamental rights be grounded in history and tradition, these cases involved marriage as that institution has traditionally been defined. They each rejected attempts to limit that historical definition.

*Loving* and *Perez* both involved anti-miscegenation laws. As described above and in King County's opening brief, such laws were

enacted as a tool of racial oppression and in abrogation of the traditional rule allowing interracial marriage. *See supra* pp. 7-8; County Opening Brief at 5, 20-22.

*Zablocki* was explicitly based on a statute's interference with the decision to marry in a traditional family setting. 434 U.S. at 386, 98 S. Ct. at 681, 54 L. Ed. 2d at 630-31 (characterizing the case as involving "a decision to marry and raise [a] child in a traditional family setting"); 434 U.S. at 396, 98 S. Ct. at 686, 54 L. Ed. 2d at 637 (Powell, J., concurring) (noting that the majority opinion applied to laws that "interfere with the decision to marry in a traditional family setting").

*Turner* involved a challenge to a regulation promulgated by the Missouri Division of Corrections that precluded inmates, who were otherwise legally qualified, from marrying. 482 U.S. at 82, 107 S. Ct. at 2258, 96 L. Ed. 2d at 74. The Court found that the prison rule improperly deprived people of the right recognized in *Zablocki* and *Loving*. *Turner*, 482 U.S. at 94-95, 107 S. Ct. at 2265, 96 L. Ed. 2d at 83. As described above, that right encompasses marriage as it has traditionally been defined.

The right that Respondents ask this Court to create and declare as "fundamental" is not the right to marry as currently defined in state law or as marriage has traditionally been defined. Although Respondents claim

that right is the “privilege” they are seeking, they already have that right. State law currently entitles anyone who can satisfy the other statutory requirements to marry a member of the opposite sex.

Instead, the fundamental right that Respondents are seeking to create is the right to same-sex marriage, which is a “right” that was certainly not held “in mind by the framers” of either the federal or the state constitution. Because the right to same-sex marriage is not a “fundamental right,” Respondents’ claims under the state Privileges and Immunities Clause are subject only to rational basis review by this Court. *See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419, 428 (2004) [hereinafter *Grant County II*].

**4. Sexual orientation is not a suspect classification.**

The King County Superior Court properly rejected the argument that sexual orientation constitutes a suspect classification, and this Court should do the same.

In the King County decision, the court noted that the substantial weight of appellate authority runs contrary to the position of Andersen and Castle. CP 178 (citing *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990)). The court also correctly noted, based on “respect for the separations of powers” that courts should be “reluctant to establish new suspect classes.” CP 178 (citing *Thomasson*

*v. Perry*, 80 F.3d 915, 928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996)).

Based on this well-established authority and the traditional test for evaluating a claim of a suspect class set forth in *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3251, 87 L. Ed. 2d 313, 320 (1985), the superior court found that “in view of the record herein, this court is not in a position to announce a potentially far-reaching new rule that homosexuality defines a suspect class for purposes of constitutional analysis. It will decline to do so.” CP 178.<sup>5</sup>

This Court should reject Castle’s suggestion that this Court create a new suspect class based on sexual orientation. No Washington court has ever found sexual orientation to be a suspect classification. *See, e.g., Singer*, 11 Wn. App. at 262, 522 P.2d at 1196. Similarly, no federal court has ever found sexual orientation to be a suspect classification. *See Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11<sup>th</sup> Cir. 2004) (holding that “all of our sister circuits<sup>6</sup> that have considered the

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<sup>5</sup> Andersen does not challenge this ruling.

<sup>6</sup> *Lofton* cited the eight other circuits that have considered and rejected claims that lesbians and gay men constitute a suspect class. *Lofton*, 358 F.3d at 818 (citing *Equal Found. of Greater Cincinnati, Inc., v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Richenberg v. Perry*, 97 F.3d 256, 260 (7th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Thomasson*, 80 F.3d at 928; *High Tech Gays*, 895 F.2d at 573-74; *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Rich v. Sec’y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984)).

question have declined to treat homosexuals as a suspect class”), *cert. denied*, (U.S. Jan. 10, 2005) (No. 04-748).

In support of its argument, Castle relies upon an unpublished trial court decision from a superior court in Alaska as supporting their argument that lesbians and gay men are a suspect class. *See* Castle Brief at 50 (citing *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998)). In fact, *Brause* did not find lesbians and gay men to be a suspect class; instead, the court ruled on the fundamental right issue. *Brause*, 1998 WL 88743, at \*6. Moreover, *Brause* is of no precedential value. This trial court decision was never considered on appeal and was overruled by an amendment of the Alaska Constitution. *See* ALASKA CONST. art. I, § 25. Finally, this Court should not rely on this questionable decision because it is an unpublished, superior court decision from another state. *See Mendez v. Palm Harbor Holmes*, 111 Wn. App. 446, 471-72, 45 P.2d 594, 608 (2002) (indicating that unpublished opinions from other states should not be cited as authority).

The King County Superior Court properly followed well-reasoned state and federal law holding that lesbians and gay men do not constitute a suspect class. This Court should do the same.

**5. The legislature had a rational basis to limit marriage to opposite-sex couples.**

This Court should evaluate Respondents' challenge to Washington's marriage statute based on rational basis review. *See Paulson v. County of Pierce*, 99 Wn.2d 645, 652, 664 P.2d 1202, 1207, *appeal dismissed*, 464 U.S. 957 (1983) (holding that the rational basis test should be applied to constitutional challenges that do not involve a fundamental right or suspect class). As discussed above, no fundamental right or suspect class is at issue in the present case. *See supra* pp. 8-13. Therefore, Washington's marriage statute is appropriately reviewed under the rational basis test.

King County, in its opening brief, addressed the rational basis for Washington's marriage statute. *See County Opening Brief* at 31-38. Appellant State of Washington and Appellant-Intervenors Senator Val Stevens et al. also addressed this issue. *See Brief of Appellant State of Washington* at 34-42; *Brief of Intervenors* at 45-44. In response to the rational basis described by Appellants, Respondents focus on two claims. They contend that the information upon which the legislature relied was wrong, and they contend that the legislature was actually motivated by other factors. *See Castle Brief* at 29-31, 39 n.16; *Andersen Brief* at 74-77. Whether true or not, these claims are irrelevant in these proceedings.

This Court need not divine what actually motivated the legislature. *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). Moreover, given that Washington's marriage law, which precludes same-sex marriage, originated in 1854, claims regarding the motivations of some legislatures in 1998 could not inform an understanding of that law. Finally, this court does not need to determine whether the legislature was actually correct that society will be better off limiting marriage to opposite-sex couples. *See, e.g., Seeley v. State*, 132 Wn.2d 776, 795-96, 940 P.2d 604, 613-14 (1997) (holding that legislation only fails rational basis review if there are no conceivable facts to support it and that the legislature is not even required to have actually considered those facts). This is a policy question, which in a democracy must be answered by elected policy makers.

The legal issue in this case is simply whether legislators could rationally conclude that they advance the public welfare by limiting marriage to opposite-sex couples. When presented in the proper context, the legal issue in this case is easily resolved.

As outlined in King County's opening brief, the government's strong interest in furthering and protecting procreation and child-rearing as one rational basis for limiting marriage to opposite-sex couples. *See County*

Opening Brief at 33-38. Washington is far from alone in recognizing the governmental interest in limiting marriage to opposite-sex couples. Courts have recognized that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate governmental concern. *See, e.g., Bowen v. Gilliard*, 482 U.S. 587, 614, 107 S. Ct. 3008, 3024, 97 L. Ed. 2d 485 (1987) (Brennan J., dissenting) (noting that "scholarly research indicates . . . that "[t]he optimal situation for the child is to have both an involved mother and an involved father"); *Lofton*, 358 F.2d at 819 (considering the state's argument that the presence of both male and female authority figures in the home is critical to optimal childhood development, the court held that "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society"). Several cases address this issue specifically with regard to same-sex marriage. *See, e.g., Adams*, 486 F. Supp. at 1124 (explaining that "the main justification in this age for societal recognition and protection of the institution of marriage is procreation"); *Standhardt*, 206 Ariz. at 286, 77 P.3d at 461; *Baker*, 291 Minn. at 313, 191 N.W.2d at 187 (holding that "[t]he equal protection clause of the Fourteenth Amendment,

like the due process clause, is not offended by that state's classification of persons authorized to marry").

The marital relationship has consistently been a unique institution. Most opposite-sex couples have the ability to create, without the involvement of a third party, a child who is biologically related to both of them. No other relationship has this potential. The unique and profound biological relationship between mothers and fathers and their children provides a rational basis to treat relationships that can create children differently than other relationships.

In accordance with this general procreation interest, the legislature could rationally decide to limit the legal rights and obligations of marriage to opposite-sex couples. The need to address the sometimes conflicting rights and obligations of the same-sex couple and the necessary third party in relation to the child provides a rational basis for limiting traditional marriage and its legal implications to opposite-sex couples.

The legislative interest in addressing the legal rights and responsibilities of the third party and the child is consistent with the law of marriage. The law does not define the *personal* relationship of same-sex couples; the law merely sets out *legal* rights and responsibilities. See *Wash. Statewide Org. of Stepparents v. Smith*, 85 Wn.2d 564, 569, 526 P.2d 1202, 1206 (1975) (holding that "the legal duties and rights of the

parties with respect to the marriage relationship are determined by statute”). Moreover, the law already generally allows same-sex couples to take advantage of many of the benefits that automatically come with marriage. For example, domestic partner benefits, rights to property division, and adoption are in many cases available to same-sex couples.

Respondents complain that the classification used by Washington’s marriage statute is over-inclusive in that some opposite-sex couples might not have children. *See* Castle Brief at 32-33. That Washington’s marriage statute may be over-inclusive is not relevant. *See Campbell v. State of Wash., Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 901, 83 P.3d 999, 1010-11 (2004). Moreover, with regard to furthering procreation, there is no lawful alternative to a marriage statute that is somewhat over-inclusive. The legislature has generally chosen to accomplish the legislative objective regarding procreation and child-rearing by promoting marriage between opposite-sex couples. Although there might hypothetically be ways to act more narrowly, such alternatives are properly rejected. An alternative to the current statute would be to inquire of, and possibly even test, each couple applying for a marriage license regarding their intention and ability to have children. Such an examination would raise obvious constitutional problems. *See Griswold v. Ct.*, 381 U.S. 479, 485-86, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 516 (1965). Finally, attempting to

ascertain which opposite-sex couples might not have children would raise significant concerns regarding both efficacy and constitutionality. *See Standhardt*, 206 Ariz. at 287, 77 P.3d at 462 (discussing permissible rationale for allowing all opposite-sex couples to marry is based on a possibility that such couples will have children).

In summary, rational basis review calls for great deference to legislative decisions. The decision to limit marriage to opposite-sex couples simply cannot be found to be so devoid of reason that it fails to satisfy rational basis review.

**6. Washington's marriage statute could satisfy strict scrutiny.**

Were this matter subject to strict scrutiny instead of rational basis review, Washington's marriage statute should also satisfy strict scrutiny review. The legislature formally determined that compelling governmental interests supported the Defense of Marriage Act. *See LAWS OF 1998*, ch. 1, § 2. This determination is supported by case law. *See Adams*, 486 F. Supp. at 1124-25 (explaining that a statute limiting marriage to opposite-sex couples was supported by a compelling interest and was the least intrusive alternative available to protect that interest).

**C. Washington's marriage statute does not violate the Privileges and Immunities Clause of the Washington Constitution.**

Recognizing that the federal constitution does not support requiring states to authorize same-sex marriage, Respondents focus on a claim that Washington's marriage statute violates the Privileges and Immunities Clause of the state constitution. *See* Andersen Brief at 55-78; Castle Brief at 10-56. This argument should be rejected.

**1. The scope of the Privileges and Immunities Clause has been carefully defined by this Court.**

This Court recently addressed the extent to which the state Privileges and Immunities Clause applies more broadly than the parallel provision of the federal constitution. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 725-31, 42 P.3d 394, 405-08 (2002) [hereinafter *Grant County I*], *vacated in part on reh'g, Grant County II*, 150 Wn.2d at 805-11, 83 P.3d at 425-28. The Washington Privileges and Immunities Clause has generally been interpreted as providing the same level of protection as the parallel provision of the federal constitution. *See, e.g., Am. Network, Inc. v. Wash. Utils. & Transp. Comm'n*, 113 Wn.2d 59, 77, 776 P.2d 950, 960 (1989); *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 476, 611 P.2d 396, 403 (1980). In *Grant County I* and *II*, this Court utilized the analysis required by *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), to determine the extent to which the

Privileges and Immunities Clause of the Washington Constitution conferred rights beyond those conferred by parallel provisions of the U.S. Constitution. *See Grant County II*, 150 Wn.2d at 805-11, 83 P.3d at 425-28; *Grant County I*, 145 Wn.2d at 725-31, 42 P.3d at 405-08.

In *Grant County I* and *II*, this Court concluded that the state clause applies more broadly than the parallel federal clause in cases involving grants of *positive favoritism* to *avored minorities*. On the other hand, the federal Equal Protection Clause precludes *negative discrimination* against *disavored minorities*. *See Grant County II*, 150 Wn.2d at 808-09, 83 P.3d at 426-27. The *Grant County II* holding is fully addressed in King County's opening brief. *See County Opening Brief* at 40-45. The case at bar is based on a theory of negative discrimination, and accordingly Respondents' claim is properly analyzed under the federal constitution.

This Court should follow *Grant County II* because it is the product of a well-developed constitutional analysis. The extent to which each state's constitution confers rights beyond those contained in the federal constitution is the subject of significant academic thought. *See, e.g., DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* 317-35 (Bradley D. McGraw ed. 1985); Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law, 1980-1989*, 20 RUTGERS L.J. 1093, 1093-1113 (1989). Many states are criticized for having unprincipled, ad hoc approaches to

analyzing their state constitutions. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763-64, 785-88 (1991); *see also 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 contrast to many other states, Washington has, through the *Gunwall* line of cases, developed a sophisticated, systematic and logical approach to state constitutional analysis. That analysis should be followed in this case.

A right to same-sex marriage is not within the scope of the Privileges and Immunities Clause as that provision is defined by *Grant County I* and *II*. *Grant County I* and *II* were recently and properly decided, and they should be followed here. Further, Respondents' claim that *Grant County I* and *II* provide a more protective analysis in this case is misplaced.

2. **Even if this Court were to expand the Privileges and Immunities Clause beyond the scope established in *Grant County I* and *II*, this clause should not be interpreted to convey a constitutional right to same-sex marriage.**

Even if the scope of the state Privileges and Immunities Clause were expanded beyond the holding of *Grant County I* and *II*, it would still not give rise to a constitutional right to same-sex marriage.

This Court should reject Andersen's contention that the Privileges and Immunities Clause should be expanded beyond the scope established in *Grant County I* and *II* without the necessity of engaging in a *Gunwall* analysis. See Andersen Brief at 18. This contention is not based on a claim that this Court has already conducted the necessary *Gunwall* analysis. Instead, it is premised on the assertion that there is no federal law addressing whether there is a constitutional right to same-sex marriage. See Andersen Brief at 18. As discussed above, this premise is mistaken. See *supra* pp. 4-7.<sup>7</sup>

Moreover, even if there was no controlling federal law on the issue of whether there is a constitutional right to same-sex marriage, a *Gunwall* analysis would still be required. In *Grant County I* and *II*, for example, there was no body of federal case law on whether individuals had a constitutional right to vote on a municipal annexation issue, yet this Court still engaged in a *Gunwall* analysis. *Grant County II*, 150 Wn.2d at 815, 83 P.3d at 430 (noting only one 1907 federal case on the issue). The

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<sup>7</sup> In this matter, neither Andersen nor the King County Superior Court engaged in an analysis, as required by *Gunwall*, to support a determination that the Privileges and Immunities Clause (or any other clause) of the Washington Constitution requires the legislature to authorize same-sex marriage. See CP 876-901; Andersen Brief at 55-78. The Thurston County Superior Court and Castle did engage in such an analysis. *Castle v. State*, No. 04-2-00614-4, slip op. at 14-23, 2004 WL 1985215, at \*6-\*10 (Thurston County Super. Ct. Sept. 7, 2004); Castle Brief at 11-19. That argument will be addressed here.

instant matter contrasts markedly with *Grant County II* in that numerous cases address claims of a federal constitutional right to same-sex marriage.

A decision to expand the scope of the state constitution must be the product of a careful analysis. See *Gunwall*, 106 Wn.2d at 58, 720 P.2d at 811. *Gunwall* requires analysis of the following six nonexclusive factors: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common-law history; (4) preexisting bodies of state law, including statutory law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *Id.* at 61-62, 720 P.2d at 812-13. The state constitution can be applied more broadly than the federal constitution *only if* such an interpretation is supported through analysis of these six factors set forth in *Gunwall*. See *id.* at 63, 720 P.2d at 813. Analysis of the *Gunwall* factors supports the determination that the state constitution does not convey a right to same-sex marriage.

- a. **The textual language of the Privileges and Immunities Clause, particularly when compared to the parallel provision of the federal constitution, supports the determination that the state provision is directed at preventing favorable treatment for privileged groups.**

The first two *Gunwall* factors require a consideration of the textual language of the state provision and the differences between the state

provision and the parallel provision of the federal constitution. *See id.* at 61, 720 P.2d at 812. In this matter, analysis of these two factors substantially overlaps, and they should be considered together.

There is a significant difference in the text of the state Privileges and Immunities Clause and the federal Equal Protection Clause. The federal Equal Protection Clause provides, in pertinent part, as follows:

No state . . . shall . . . *deny* to any person within its jurisdiction the equal protection of the laws.

*See* U.S. CONST. amend. XIV, § 1 (emphasis added). The state Privileges and Immunities Clause provides as follows:

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.

*See* WASH. CONST. art. I, § 12 (emphasis added). The text of the federal provision is aimed at “negative discrimination.” It prohibits states from *denying* benefits that are generally available to others under the law. Conversely, the state clause is aimed at “positive favoritism.” It prohibits the *grant* of special privileges and immunities that give some or a few elevated status before the law.

In interpreting its similar constitutional provision, the Oregon Supreme Court held that the provisions of the state constitution are the “antithesis of the [F]ourteenth [A]mendment” because the state provisions

prevent the *enlargement* of the rights of some in discrimination against the rights of others whereas the Fourteenth Amendment instead prevents the *curtailment* of rights. See *Oregon v. Clark*, 291 Or. 231, 236 n.8, 630 P.2d 810, 814 n.8 (quoting *State v. Savage*, 96 Or. 53, 59, 184 P. 567, 570 (1919)), *cert. denied*, 454 U.S. 1084 (1981).

- b. The historical context for development of the Privileges and Immunities Clause supports the determination that it was intended to prevent favorable treatment for corporations and other powerful interests.**

The third *Gunwall* factor requires Respondents to demonstrate exactly how the constitutional and common law history of the state Privileges and Immunities Clause supports their particular claim.

*Gunwall*, 106 Wn.2d at 61, 720 P.2d at 812.

Castle suggests that this Court not follow *Grant County I* and *II* but instead look to the case law of Oregon interpreting the parallel clause of its constitution.<sup>8</sup> See Castle Brief at 13-14. Castle does not provide any reason why the test articulated in *Grant County I* and *II* should be altered or ignored. This Court has already incorporated an analysis of the

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<sup>8</sup> Washington modeled its Privileges and Immunities Clause after Article I, Section 20 of the Oregon Constitution. See QUENTIN SHIPLEY SMITH, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 WITH ANALYTICAL INDEX, at 500-01 & n.20 (reprint 1999) (Beverly Paulik Rosenow ed., 1962). Oregon's constitutional framers had modeled their constitution after the 1851 Indiana Constitution. See Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1253 & n.28 (1996).

Privileges and Immunities provision of the Oregon Constitution into Washington's Privileges and Immunities Clause analysis. As part of the *Gunwall* analysis, *Grant County I* and *II* considered the Privileges and Immunities Provision of the Oregon Constitution. See *Grant County II*, 150 Wn.2d at 808-09, 83 P.3d at 426-27; *Grant County I*, 145 Wn.2d at 727-28, 406-07. It is therefore not necessary for this Court to deviate from this Court's *Gunwall* analysis in *Grant County I* and *II* in order to consider appropriately the Oregon Constitution.

The Washington Privileges and Immunities Clause is appropriately interpreted differently than its Oregon counterpart because these two clauses contain different language, and they were developed decades apart in very different historical contexts. The Washington Privileges and Immunities Clause differs from its counterpart in the Oregon Constitution in that the framers of the Washington Constitution added a reference to corporations because the framers perceived that corporations were manipulating the lawmaking process. Thompson, *supra*, at 1253. The addition of "corporations" is instructive in differentiating how the two states interpret their clauses. In *Grant County II*, this Court examined the history of the Washington provision, accentuating why this state added the reference to corporations, and describing the genesis of the Fourteenth Amendment. *Id.* at 808-09, 83 P.3d at 426-27.

This variation in the language is a product of the different historical context in which the constitutions were developed. The provisions of the Oregon Constitution, which was adopted in 1859, and the Indiana Constitution, which was adopted in 1851, both pre-date the enactment of the Fourteenth Amendment of the U.S. Constitution in 1868. See ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION – A REFERENCE GUIDE 26-27 (2002); see also *State v. Smith*, 117 Wn.2d 263, 283 & n.1, 814 P.2d 652, 661-62 & n.1 (1991) (Utter, J., concurring). In *Smith*, Justice Utter explained the difference between the Fourteenth Amendment and the state Privileges and Immunities Clause.

The Fourteenth Amendment was enacted after the Civil War and its purpose was to eliminate the effects of slavery. It was intended to guarantee that certain classes of people (blacks) were not denied the benefits bestowed on other classes (whites), thereby granting equal treatment to all persons. *Enacted after the Fourteenth Amendment, state privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups.*

*Smith*, 117 Wn.2d at 283, 814 P.2d at 661-62 (emphasis added) (Utter, J., concurring).

While the adoption of the Fourteenth Amendment eliminated the need for a state constitutional provision to prevent discriminatory treatment of disfavored minorities, intervening historical events gave rise

to an interest in a state constitutional provision to remedy a problem not addressed by the Fourteenth Amendment, which was to prevent special treatment for favored groups. Washington became a state in 1889, thirty years after Oregon. Washington's troubled political history during those three decades resulted in a different constitutional focus. The late nineteenth century in America was an era of rapidly increasing concentrations of wealth in the hands of relatively few individuals. *See* Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 WASH. L. REV. 669, 671 & n.16 (1992). The expansion of corporate power in Washington was accompanied by numerous problems. Between 1862 and 1863, the legislature had passed no general laws, but enacted more than 150 pieces of special legislation for the benefit of private interests and to the detriment of the general welfare. *See id.* at 671 & n.11. Governmental corruption existed in all three branches of government, and powerful corporations were often at the root of governmental corruption. *See* Wilfred J. Airey, *A History of the Constitution and Government of Washington Territory 180-86*, 207-21 (1945) (unpublished Ph.D. dissertation, University of Washington) (on file with the Univ. of Wash. Library); Snure, *supra*, at 671 & n.13.

It is within this historical context that the Washington and Oregon Privileges and Immunities Clauses should be compared. Washington drew not only from Oregon's experience, but also from three decades of its own experience in the latter half of the nineteenth century. Unlike Oregon, Washington reached statehood twenty-one years after the Fourteenth Amendment had been adopted. With the Fourteenth Amendment already forbidding the curtailment of rights from a particular group, Washington concentrated on curtailing laws that merely served the interest of special classes of citizens to the detriment of all citizens. *See Smith*, 117 Wn.2d at 283, 814 P.2d at 661-62.

Looking at the Washington Constitution as a whole gives further insight into the framers' intent of guarding against the evils of special interest groups such as railroads. This was cogently expressed by Jonathon Thompson.

The language used in article 1, section 12, as well as the sentiment it expresses, can be found in other original provisions of the Washington Constitution. Article 1, section 8 states that: "No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature." Article 1, section 28 states that: "No hereditary emoluments, privileges, or powers, shall be granted or conferred in this state." Article 2, section 28 states, in part: "The legislature is prohibited from enacting any private or special laws . . . [f]or granting corporate powers or privileges." These are but a few variations on a dominant theme of the Washington Constitution, and other state constitutions adopted around the same time: that laws should be general in application and

special interests should not be permitted to obtain privileges or carve out unjustified immunities. All of these provisions reflect a concern about the ability of powerful minorities to obtain benefits at the expense of underrepresented majority interests.

Thompson, *supra*, at 1255-56 (alteration in original) (footnotes omitted).

The unique historical context surrounding the passage of Article I, Section 12 of the Washington Constitution sets this clause apart from its counterpart in the Oregon Constitution. Washington had almost four decades of experience and the passage of the Fourteenth Amendment to inform its conclusion regarding the necessity of protecting the majority from corruption and special interest groups. The case at bar does not involve the grant of a special right to a privileged minority group. Therefore, in this case the state Privileges and Immunities Clause does not apply more broadly than the federal Equal Protection Clause.

**c. Preexisting territorial law supports the conclusion that the Privileges and Immunities Clause was directed at preventing powerful interests from getting special rights.**

The fourth *Gunwall* factor requires an examination of preexisting state law, including statutory law, when considering a claimed constitutional right. *See* 150 Wn.2d at 809, 83 P.3d at 427. This factor requires the examination of preexisting state law to determine what kind of legal protection has been afforded to the right to same-sex marriage.

This analysis entails examination of law preexisting the constitution, as well as relevant common law, case law, statutory law, and public policy.

An examination of Washington's preexisting law reveals no support for a claimed constitutional right to same-sex marriage. Respondents do not dispute that Washington's marriage statutes, beginning in 1854, have without exception contemplated that marriage was solely between a male and a female. This is the only definition of marriage that has ever been approved in Washington, even as a territory, and it continues through the present.

Although Washington's marriage statute has periodically been amended, the prohibition on same-sex marriage has always remained. In 1972, Washington adopted the Equal Rights Amendment, which required that males and females be treated equally under the law. The following year, the legislature amended the marriage statute to come into compliance with the Equal Rights Amendment. *See LAWS OF 1973, ch. 154, § 26.* Gender distinctions are thus no longer contained in RCW chapter 26.04. The application of this change in language was confirmed in the 1974 *Singer* decision, which held that the applicable marriage statutes did not permit same-sex marriage.

In 1998, Washington joined the great majority of other states and adopted its own Defense of Marriage Act. *See LAWS OF 1998, ch. 1.* As a

substantive matter, the adoption of this statute did not change the law in Washington. It did, however, offer an opportunity for the legislature to speak to this issue. The Final Legislative Report summarized the legislature's intent as follows:

A legislative finding is made that matters relating to marriage are reserved to the sovereign states and should be determined by the people within each individual state, and not by the people or courts of another state. The Legislature intends to exercise the authority granted to states by the Congress in the federal Defense of Marriage Act to establish in statute a public policy against same-sex marriage.

Washington is declared to have a compelling interest in reaffirming and protecting its historical commitment to the institution of marriage as a union between a man and woman as husband and wife.

*See* 1998 FINAL LEGISLATIVE REPORT, 55th Leg., Reg. Sess. at 10 (Wash. 1998).

Castle suggests that Washington's historically progressive marriage laws supports a constitutional right to same-sex marriage. *See* Castle Brief at 14-17. Respondents characterize the issue being one of "marriage" not "same-sex marriage." As discussed above, historical considerations of marriage contemplated only opposite-sex marriage. Moreover, Washington's historically progressive marriage laws do not support a state constitutional right to marriage beyond what was traditionally allowed. All of the relevant considerations, including preexisting statutes, case law,

common law and public policy, result in an identical conclusion. Analysis pursuant to the fourth *Gunwall* factor does not therefore support an enlargement of rights beyond that granted by the Fourteenth Amendment.

**d. Analysis pursuant to the final *Gunwall* factors does not suggest a broader scope for the Privileges and Immunities Clause.**

The fifth and sixth *Gunwall* factors did not have a significant effect on this Court's conclusion in *Grant County I* and *II* regarding the scope of the state Privileges and Immunities Clause. This brief therefore does not address them further.

In conclusion, even if this Court were to revisit *Grant County I* and *II* and create a broader application of the state Privileges and Immunities Clause, a right to same-sex marriage should not be found to be within the scope of that clause.

**D. Washington's marriage statute does not violate the Washington Constitution's Due Process or Privacy Clauses.**

**1. Washington's marriage statute does not violate the Due Process Clause because it does not impinge on a fundamental right.**

The King County Superior Court correctly recognized that analysis of a substantive due process claim is similar to the analysis of a federal equal protection or state privileges and immunities claim. CP 897 (analyzing substantive due process claim based on the same analysis as the

privileges and immunities claim). Andersen appears to support this conclusion in that their due process argument largely mirrors their privileges immunities argument that there is a fundamental right to same-sex marriage. *See* Andersen Brief at 16-34. King County has addressed those arguments above. *See supra* pp. 8-11.

**2. Washington’s marriage statute does not impinge on any right to privacy.**

Although not raised by Andersen, Castle asserts a privacy-based argument. *See* Castle Brief at 56-67. Washington’s marriage statute does not, as claimed by Castle, violate the right to privacy under the Washington Constitution. The Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST. art. I, § 7. The right protected by this provision is to be free from unreasonable intrusion into one’s private affairs. *See State v. Ferrier*, 136 Wn.2d 103, 110, 960 P.2d 927, 930 (1998). A disturbance into one’s private affairs occurs when the government intrudes upon those “privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass . . . .” *State v. Myrick*, 102 Wn.2d 506, 511, 668 P.2d 151, 154 (1984). This case has nothing to do with Respondents’ private affairs. Same-sex couples are not prevented from having whatever sort of *private*

relationship they choose. What Respondents seek from this Court is *public* recognition and approval of their same-sex relationships.

**3. Washington’s marriage statute does not violate the Due Process Clause because it does not impinge on a fundamental right or liberty interest.**

Since no fundamental right or liberty interest is at issue, Respondents’ substantive due process claim is subject to rational basis review. *See Wash. v. Glucksberg*, 521 U.S. 702, 728, 117 S. Ct. 2258, 2271, 138 L. Ed. 2d 772, 792 (1997), *cert. denied*, 527 U.S. 1041 (1999); *In re Personal Restraint of Metcalf*, 92 Wn. App. 165, 176-77, 963 P.2d 911, 918 (1998), *cert. denied*, 527 U.S. 1041 (1999). As discussed above, the legislature had a rational basis to limit marriage to opposite-sex couples. *See supra* pp. 14-19. Moreover, even if this Court were to review Washington’s marriage statute under strict scrutiny, Washington’s marriage statute could satisfy such review. *See supra* p. 19.

**E. Washington’s marriage statute does not violate the gender equality provision of the Washington Constitution.**

Andersen incorrectly suggests that Washington’s marriage statute violates the Washington’s Constitution’s Equal Rights Amendment [“ERA”]. *See Andersen Brief* at 36-55. As Castle correctly notes, “[i]n the three decades since the ERA was enacted, Washington courts have also acted to ensure that the status of civil marriage no longer

discriminates on the basis of sex.” Castle Brief at 44-45. Indeed, for all relevant purposes, Washington’s marriage statute treats men and women *exactly* alike: both men and women may marry only members of the opposite sex.

Nevertheless, Andersen argues that Washington’s marriage statute violates the ERA because Ms. Reis cannot marry Ms. Steele “because she is a woman” and that this somehow constitutes illegal sex discrimination against women. Andersen Brief at 39. The only reason that Ms. Reis cannot marry Ms. Steele is that they are of the same sex – this has nothing to do with sex discrimination. Just as Mr. Ilgenfritz cannot marry Mr Schull, Ms. Reis and Ms. Steele cannot marry each other. The statute barring same-sex marriages applies equally to both sexes in all regards. Therefore, the rule is not discriminatory based on gender; both genders are treated the same.

Yet, just as the plaintiff argued in *Singer*, Andersen tries to equate the obviously discriminatory law barring blacks from marrying whites that was at issue in *Loving* to Washington’s marriage statute. However, the law at issue in *Loving* was enacted to promote the supremacy of whites over blacks. Washington’s marriage statute has no such equivalent purpose or effect. Indeed, as correctly stated by Castle, “civil marriage [in Washington] no longer discriminates on the basis of sex.” If, however,

Washington's marriage statute permitted men to marry women *or* men but only permitted women to marry men, then Andersen's argument would have merit. Washington's marriage statute, however, treats all men and all women exactly alike for all relevant purposes. Therefore, no amount of legal gymnastics is going to give rise to a violation of the ERA.

**F. If this Court were to find any constitutional violation, this Court should allow the legislature to remedy those violations.**

This Court should reject Respondents' suggestion that this Court is limited to an "all or nothing" decision. As outlined above and in the other briefing submitted in this matter, Respondents' claim should be dismissed. If their claim is not dismissed, Respondents suggest that this Court must declare Washington's marriage statute to be unconstitutional. As described below, however, Respondents fail to acknowledge the range of options available to this Court. *See also* State's Brief at 49-50.

The King County Superior Court noted that there were several potential remedies for a constitutional violation, including allowing same-sex couples to marry or creating another mechanism, such as civil unions, to make available to same-sex couples the tangible benefits that flow under the law from marriage. CP 898-99. The court noted that there were important policy considerations with regard to which remedy was selected. CP 898-99.

If the Respondents were to prevail, this Court should allow the legislature to remedy any constitutional violation. Generally, when faced with a constitutional challenge to a statute, the judiciary should choose the least severe remedy for any constitutional violation. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 804, 23 P.3d 477, 481 (2001) (holding that “it must be clear that the legislation cannot reasonably be construed in a manner that comports with constitutional imperatives”); *see also* *Philippides v. Bernard*, 151 Wn.2d at 391, 88 P.3d at 946 (holding that courts must “construe a statute as constitutional if at all possible”).

A legislative remedy would be particularly appropriate given the arguments in this case. As Respondents’ briefs highlight, there are certain tangible benefits and responsibilities as a consequence of being married. Some of these consequences may operate to a particular couple’s advantage; some may operate to the couple’s disadvantage. Respondents seem to suggest that if this Court were to find that Respondents are entitled to any of these tangible benefits of marriage, then the only remedy would be to allow the couple to marry. Respondents, however, ignore the possibility that the particular benefit could be provided without regard to

marital status or by virtue of some other legal status.<sup>9</sup>

If there is to be any “all or nothing” decision in this case, the result would have to be a rejection of Respondents’ claims. Respondents have initiated a facial challenge to Washington’s marriage law. *See, e.g.*, Castle Brief at 68. Respondents simply asked for a declaration that Washington’s marriage statute is facially unconstitutional and that they be allowed to marry. This argument should be rejected. Further, 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 Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808, 828 n.14 (2000) (holding that “a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied”).

#### IV. CONCLUSION

Case law clearly and without exception establishes that the U.S. Constitution does not require states to allow same-sex marriage.


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<sup>9</sup> Although most states simply reject same-sex marriage, in Vermont the court found that same-sex couples were entitled to some of the tangible benefits that flow from marriage. *See Baker v. Vermont*, 170 Vt. 194, 201-06, 224, 744 A.2d 864, 870-73, 886 (1999) (holding that denying same-sex couples the benefits incidental to a civil marriage violated the Common Benefits Clause of the state constitution).

Moreover, the Washington Constitution does not convey such a right. Even a broader interpretation of the state constitution, as urged by Respondents, would not support a determination that Washington's marriage statute is unconstitutional. There is no fundamental right to same-sex marriage and lesbians and gay men do not constitute a suspect class. Accordingly, even under a broad interpretation of the state Privileges and Immunities Clause, Respondents' claims are subject to rational basis review. The trial court decisions should be reversed.

DATED this 15<sup>th</sup> day of January, 2005.

NORM MALENG  
King County Prosecuting Attorney

By:   
DARREN E. CARNELL, WSBA #25347  
JANINE E. JOLY, WSBA #27314  
KRISTOFER J. BUNDY, WSBA #19840  
Senior Deputy Prosecuting Attorneys  
Attorneys for Appellant King County