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Supreme Court No. 75934-1 ^{By: G. L. HERRITT}

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN, et al. Respondents,

v.

KING COUNTY, et al. Appellants,

CELIA CASTLE and BRENDA BAUER et al., Plaintiffs,

v.

STATE of WASHINGTON, Defendant.

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SUPPLEMENTAL BRIEF OF RESPONDENTS CASTLE, ET AL

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Respondents in *Castle v. State* submit this supplemental brief to address questions posed by Justice Madsen at oral argument. Specifically, Justice Madsen inquired whether, if the record reflected evidence of discrimination as a purpose behind passage of the Defense of Marriage Act (“DOMA”), the Respondents would be required to demonstrate that the law passed “strictly” based upon that animus.

As explained in earlier briefing, Article I, section 12 of the Washington Constitution requires a higher level of scrutiny than is found in federal cases applying rational basis review. But even under the federal standard, if there is any indication that the challenged legislation was motivated even in part by discrimination, the burden shifts to the State to prove that the law would have been enacted based solely on the proffered alternative justifications.

This issue was addressed in *Village of Arlington Heights v Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). There, the Supreme Court recognized the difficulty in determining whether legislation was passed based on invidious discrimination:

Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a

particular purpose was the “dominant” or “primary” one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration

Id. at 265.

The Supreme Court thus concluded: “When there is a proof that a discriminatory purpose has been a motivating factor in the decision, **this judicial deference is no longer justified.** *Id.* at 265-66 (emphasis added) The Court noted that there are a number of ways to demonstrate proof that a discriminatory purpose has been a motivating factor and that “legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Id.* at 268

In *Cook v. Babbit*, 819 F Supp 1 (D D.C 1993), the District Court explained the shifting burden that results when a showing is made that a discriminatory purpose was in part a motivating force:

There is some subtlety, however, in the way the burden of proof is allocated in a purposeful discrimination case. At the outset, the official action enjoys a presumption of validity, and plaintiff bears the burden of production as well as persuasion. But plaintiff does not have to make the ambitious claim that the official action was motivated “solely” by impermissible considerations, or even that such was the “dominant” or “primary” motivation. Indeed, to meet her initial burden of production, plaintiff need not

even show that "but for" the presumptively impermissible sentiment, a different decision would have been reached-- even though that is the ultimate constitutional test. Plaintiff only has to show that the decision was motivated *in part* by [an invidiously] discriminatory purpose."

Cook, 819 F. Supp. at 17-18 (emphasis in original) (citations omitted)

The Court continued that once a plaintiff has made such a showing, "the presumption of validity is vitiated, a presumption of invalidity arises, and the burden shifts to the government to demonstrate that 'the same decision would have resulted even had the impermissible purpose not been considered.'" *Id.* at 17 (citing *Mt. Healthy City School Dist. Bd of Ed v Doyle*, 429 U.S. 274, 285-87, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), *Arlington Heights*, 429 U.S. at 270 n. 21; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S. Ct. 1089, 1093-95, 67 L. Ed. 2d 207 (1981) (discussing burden shifting in Title VII cases))

Here, the legislative history of DOMA is replete with statements of "moral disapproval" of gays and lesbians, which, as the State conceded in oral argument, cannot form the rational basis for legislation that discriminates against a class of citizens. At a minimum, even under federal rational basis review, these statements negate any presumption of validity and shift the burden to the government to demonstrate a rational basis that, standing alone, would have resulted in the passage of the legislation. Where all other State legislation regulating heterosexual

procreation and child-rearing is unrelated to marriage, and the science of procreation has evolved to allow unassisted reproduction (with the sanction of the State), the State cannot meet its burden.

The State may respond that *Arlington Heights*, *Cook*, and like cases are inapposite because they concern racial and gender discrimination, both of which demand some higher form of scrutiny. Yet, the decisions in *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), and *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), make clear that the placement of some burden upon the State is appropriate with regard to alleged gay and lesbian discrimination, even in the context of the rational relationship test. In *Romer*, the Supreme Court applied a rational basis analysis in striking down a state law that disadvantaged a discrete class of Colorado citizens – gays and lesbians. The Supreme Court noted that animus against gays and lesbians “lacks a rational relationship to legitimate state interests.” *Romer*, 517 U.S. at 632. The Court cited approvingly a prior statement by Justice Stevens that “If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.” *Id.* at 633 (quoting *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181, 101 S. Ct. 453, 462, 66 L. Ed. 2d 368 (1980) (Stevens, J., concurring) (emphasis added)). The Court concluded that laws like Colorado’s “raise the

inevitable inference that the disadvantage imposed is born of animosity” and struck down the law applying a rational relationship analysis *Romer*, 517 U.S. at 634.

In *Lawrence*, the Supreme Court again addressed a law based on a classification that denied rights to gays and lesbians. In addressing the classification at issue, the *Lawrence* Court recognized that the animus reflected in the legislation may be based on “profound and deep convictions accepted as ethical and moral principles to which [people] aspire and which thus determine the course of their lives ” 539 U.S. at 571. But such convictions did not render a burdensome classification constitutional: “The issue is whether the majority may use the power of the state to enforce these views on the whole society . . . ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’” *Id* (quoting *Planned Parenthood of Southeastern Pa v Casey*, 505 U.S. 833, 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)). Thus, a classification discriminating against a discrete class of citizens – gays and lesbians – cannot be justified based on notions of morality regardless of the depth or honesty of the conviction of the legislators. Justice O’Conner, concurring, addressed the need for closer scrutiny in the case of class-based distinctions that appear to be born out of prejudice . Distinguishing the type of rational basis applied to economic or tax legislation, Justice


O’Conner stated: “When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching for of rational basis review to strike down laws under the Equal Protection Clause ” *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).¹

In sum, when there is evidence of some discriminatory intent behind a statute, as there is here, “the presumption of validity is vitiated, a presumption of invalidity arises, and the burden shifts to the government to demonstrate that the same decision would have resulted even had the impermissible purpose not been considered.” *Cook*, 819 F. Supp. at 17 (quotations and citations omitted). In other words, the “more searching” analysis the Court must apply here requires the State to establish that DOMA would have been enacted even in the absence of legislative animosity towards gay and lesbian couples. The State, indeed no one, has made any effort meet this burden.

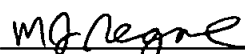
¹ In the first *Grant County* opinion, Justice Bridge recognized that under Article 1 Sec. 12 more scrutiny will be given to certain classifications (those granting an economic benefit) than others (taxation). *Grant County Fire Protection Dist. No 5 v. City of Moses Lake*, 145 Wn.2d 702, 731-32, 42 P.3d 394 (2002), *vacated in part*, 150 Wn.2d 791, 83 P.3d 419 (2004), *see also Grant County I*, 145 Wn.2d at 737 (Madsen, J., concurring/dissenting) (noting that “the type of law at issue may affect the constitutional analysis under article 1, Section 12.”)

RESPECTFULLY SUBMITTED this 13th day of April, 2005.


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