Supreme Court No. 75934-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

v.

KING COUNTY *et al.*, Appellants.

Appeal from the Superior Court of King County
The Honorable William L. Downing

CELIA CASTLE and BRENDA BAUER *et al.*, Respondents,

v.

STATE OF WASHINGTON, Appellant.

Appeal from the Superior Court of Thurston County
The Honorable Richard D. Hicks

AMICI CURIAE BRIEF OF WOMEN'S ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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STATEMENT OF CASE

Respondents are committed same-sex couples. While they desire to enter the institution of marriage, they are denied the right to marry under the State's Defense of Marriage Act ("DOMA"). Respondents challenge the constitutionality of DOMA under Washington's Constitution. Both trial courts that considered the question agreed with Respondents and held that the State's denial of the right to marry to lesbian and gay couples violated the state Constitution.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are leading non-profit women's rights and civil rights organizations dedicated to protecting the right of all people, including lesbians and gay men, to live free of government-enforced gender stereotypes and other forms of sex discrimination. See Appendix 1 to this brief for individual statements of the interest of each *Amicus*.

SUMMARY OF ARGUMENT

Washington's DOMA violates the state Constitution. This state's Equal Rights Amendment ("ERA") provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Const. art. XXXI, § 1. Washington's DOMA, on the other hand, explicitly denies the right to marry to lesbian and gay couples.[1] In so

[1] Washington's marriage statute provides that "[m]arriage is a civil contract

doing, Washington's DOMA perpetuates gender stereotypes, by positing that women and men are "opposites" – each requiring a relationship with the other for "completeness" – and denying the reality that lesbians and gay men form real, meaningful relationships and families, though they are excluded from the legal system that protects all others.

By continuing to give legal support to the belief that a marriage is not proper if it allows a man to act "like a wife" or a woman to act "like a husband," DOMA hampers the ability of women and men (both heterosexual and homosexual) to make individual decisions regarding their roles in the workplace and the family. Men and women who fail to conform to gender norms are often equated with homosexuals (regardless of their actual sexual orientation), and homosexuals and gender-non-conforming individuals alike are stigmatized in ways that devalue the "female" and the female's "traditional" role in the family. Because it hides behind these notions of what roles are "proper" in the family – bolstering a system in which men are expected to conform to (dominant)

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between a male and a female," RCW § 26.04.010(1), "and prohibits marriage [w]hen the parties are persons other than a male and a female." RCW § 26.040.020(1)(c). As Respondents' brief makes clear, Br. Resp., at 39, this law, and DOMA, violate the ERA by denying the right to marry based on sex: If Respondent Heather Andersen were a man, she could marry her partner Leslie Christian. Because she is a woman, she may not. *Amici* agree that this is facial sex discrimination that violates the ERA; rather than repeat this argument, however, this brief shows how gender-stereotype discrimination violates the ERA, and how the denial of the right to marry to gay and lesbian couples impermissibly reinforces sex stereotypes in violation of the ERA.

"masculine" ideals and women to (subservient) "feminine" ideals – the denial of the right to marry to lesbian and gay couples is a particularly invidious form of gender-stereotype discrimination. Thus, although applied "equally" to men and women, the State's denial of the right to marry to Respondents relies on impermissible gender stereotypes and the outmoded stratification of the genders that they enforce, and thus is properly recognized as sex discrimination that cannot withstand the rigorous scrutiny mandated by the ERA.

For these reasons, and as set forth in more detail below and in the Brief of Respondents, the Court should affirm Judges Downing and Hicks and order the State to issue marriage licenses to the Respondent couples.

ARGUMENT

I. The United States Supreme Court Has Held That Mandating Adherence To Gender Stereotypes About Appropriate Roles For Women And Men Constitutes Impermissible Sex Discrimination

Throughout "volumes of history," *United States v. Virginia*, 518 U.S. 515, 531, 116 S. Ct. 2264, 2274, 135 L. Ed. 2d 735, 750 (1996) (*"VMI"*), the states and the federal government, with judicial approval, used the law to perpetuate rigid definitions of gender-appropriate behavior in a variety of contexts, including marriage, in ways that now seem abhorrent. For example, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1872), the United States Supreme Court agreed with the

Illinois state courts that Illinois' exclusion of women from the practice of law passed constitutional muster under the Fourteenth Amendment of the federal Constitution. *Id.* at 137-39. In a now-infamous concurrence, Justice Bradley pointed to "[t]he natural and proper timidity and delicacy which belongs to the female sex" as reasons that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Id.* at 141-42 (Bradley, J., concurring). Justice Bradley reasoned that a particular view of sex roles – in which marriage and subordination were women's "natural" state – could justify laws mandating gender stereotypes. Even within the last 50 years, these views persisted. In *Hoyt v. Florida*, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961), the U.S. Supreme Court declared: "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." *Id.* at 61-62.

But as jurists, and society, have reached a deeper understanding of the conditions necessary to achieve true equality under the law, courts have struck down state laws that require either men or women to adhere to gender stereotypes. In a line of cases spanning from *Frontiero v. Richardson*, 411 U.S. 677, 685, 935 S. Ct. 1764, 1769, 36 L. Ed.2d 583,

591 (1973) (finding equal protection violation in rebuttable presumption of dependency of female military spouses which was based on "gross, stereotyped distinctions between the sexes"), to *VMI*, 518 U.S. at 533 (finding equal protection violation in state military academy that excluded women because it "rel[ied] on overbroad generalizations about the different talents, capacities, or preferences of males and females"), the U.S. Supreme Court has made clear that classifications based on traditional gender stereotypes violate the federal Constitution's Equal Protection Clause. Thus, courts must scrutinize classifications based on sex by engaging in "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper role of men and women." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 726, 102 S. Ct. 3331, 3336, 73 L. Ed.2d 1090, 1098 (1982).

II. Washington's ERA Goes Even Further Than The Federal Constitution In Protecting Against State Enforcement Of Sex Stereotypes Like Those Perpetuated By DOMA

While the U.S. Supreme Court's review of sex-based classifications is undeniably rigorous, this state's ERA requires even more exacting review because the ERA absolutely prohibits discrimination on the basis of sex. *See, e.g., Darrin v. Gould*, 85 Wn.2d 859, 877, 540 P.2d 882 (1975) ("Under our ERA discrimination on account of sex is forbidden."). Thus, this Court has made clear the expansive reach of the

ERA as compared to federal constitutional protections and previous state constitutional protections:

> The protections provided by the ERA go beyond those of the equal protection clause of the federal constitution and the privileges and immunities clause of the state constitution. The former equal protection approach of gender-based discrimination no longer applies.... Under the ERA, if equality is restricted or denied on the basis of sex, the classification is discriminatory.

State v. Brayman, 110 Wn.2d 183, 200-01, 751 P.2d 294 (1988). Under the ERA, Washington courts are quick to strike down laws that rely on stereotypical, outmoded gender norms, and they have been particularly vigilant in rejecting laws that impermissibly enforce traditional gender roles within the family. For example, in *Guard v. Jackson*, 132 Wn.2d 660, 940 P.2d 642 (1997), this Court considered the constitutionality of a provision that permitted any mother to bring a wrongful death action but required the father of an illegitimate child to have contributed support regularly to the child before being able to do so. *Id.* at 642. Accurately observing that "[t]he capacity to suffer loss when a child dies is not unique to mothers," *id.* at 667, the Court found "no actual difference between the sexes" justified the sex-based distinction and thus held that "the support provision unconstitutionally violates the ERA." *Id.* In other words, a law presuming that women are the primary domestic, emotional caretakers was

based on impermissible views of expected gender roles in the family unit.[2]

Significantly, in enforcing the ERA, Washington courts have properly recognized that the ERA's prohibition on state-enforced gender stereotypes will often mandate holdings that differ from those reached by earlier courts. For example, in *State v. Burch*, 65 Wn. App. 828, 837, 830 P.2d 357 (1992), the court noted that "[t]he protections provided by the ERA go beyond those of the equal protection guaranty under the federal constitution," *id.* at 837, and found that women had been impermissibly excluded from a jury based on "gender stereotypes which view women as generally governed by emotion, instinct, and feeling rather than reason, judgment, or common sense." *Id.* at 843. The *Burch* court was keenly aware of the historical dimensions of the issue, noting that "[i]ronically, these are the same gender stereotypes relied upon by the Wisconsin Supreme Court over 100 years ago to justify denying a woman admittance to the bar."[3] *Burch*, 65 Wn. App. at 843 n.7 (citing *In re Goodell*, 39 Wis. 232, 245 (1875)). The court observed with regret "that such gender

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[2] The *Guard* Court's holding shows that, like the federal Constitution's Equal Protection Clause, the ERA subjects laws that discriminate against men to the same scrutiny as those that discriminate against women.

[3] Of course, *Burch* also countermanded Washington's own cases that had relied on unacceptable gender stereotypes. *See, e.g. Freeland v. Freeland*, 92 Wn. 482, 483, 159 P. 698 (1916) ("[m]other love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's").

stereotypes still exist," *Burch*, 65 Wn. App. at 843 n.7, but properly found that under the ERA, they could not be the basis of state law.

III. Stereotypes Regarding "Proper" Sex Roles And "Proper" Sexual Orientation Are Inextricably Intertwined And Together Perpetuate The Subordination Of Women

Although our society has made great strides in eradicating many explicit sex-based classifications, traditional gender norms linger all too powerfully in beliefs that the workplace is a "masculine" sphere and that the home is "feminine." Such expectations harm both women and men by prescribing "proper" roles for each and punishing those who challenge those roles. Significantly, both women and men seen as gender-inappropriate are often equated with homosexuals (regardless of their actual sexual orientation), and homosexuals and gender-atypical individuals alike are stigmatized in a way that devalues the "female" and the female's "traditional" role in the family. Thus, the stereotypes that empower anti-gay sentiment, and the corresponding denial of the right to marry to lesbian and gay couples, are properly rejected as gender-based stereotypes seeking to solidify and exalt outdated notions of male dominance and female subordination.[4]

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[4] As Yale Law School professor William Eskridge explains, "antihomosexual attitudes are connected with attitudes sequestering women in traditional gender roles." William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 Ind. L.J. 1085, 1110 (1999).

Case law in the employment discrimination context illustrates how gender stereotypes find voice in the harassment of "effeminate" men and "masculine" women, and how the enforcement of gender stereotypes is tied to assumptions regarding sexual orientation. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed.2d 268 (1989), the U.S. Supreme Court recognized that denying a woman advancement, in part because she was perceived to be too "masculine," was impermissible sex discrimination and thus violated Title VII. "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. Women seen as aggressive or overly assertive are often equated with lesbians (regardless of actual sexual orientation), and subjected to discrimination. *See Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (harassing comments by female employer to female employee included "I thought you were the man," "I thought you wore the pants," and "[who wore] the dick in the relationship"); *Menchaca v. American Medical Response of Illinois, Inc.*, 2002 WL 48073, at *3 (N. D. Ill. Jan. 14, 2002) (comments that fired employee was a "f***ing dyke" and a "pit bull dyke" were admissible in sex discrimination case because they reflected attitude that employee "was too 'tough' and thus did not conform to traditional

sexual stereotypes").

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed.2d 201 (1998), the U.S. Supreme Court took the important step of recognizing that just as harassment of, or discrimination against, a woman for failing to meet expectations of "femininity" violated sex discrimination laws, harassment of, or discrimination against, a man for failing to meet "masculine" gender stereotypes did as well. In so doing, the Court noted that such discrimination was "assuredly not the principal evil Congress was concerned with when it enacted Title VII," but that nonetheless such behavior was properly recognized as sex discrimination and thus prohibited. *Id.* at 79-80. Similarly, while the ERA may not have been enacted with the express purpose of prohibiting the application of sex stereotypes to lesbians and gay men seeking the right to marry, withholding marriage licenses from lesbian and gay couples must properly be recognized as sex discrimination and prohibited.

Case law applying *Price Waterhouse* and *Oncale* demonstrates culturally pervasive connections among the devaluation of stereotypically female traits, hostility toward individuals who are seen as not conforming to "traditional" gender expectations of appearance and behavior, and the notion that a sexual relationship between men entails men taking on feminine (and thus submissive or inferior) roles. *See Bibby v.*

Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 259-60 (3d Cir. 2001) (harasser called male plaintiff a "sissy" and repeatedly yelled at plaintiff, "everyone knows you're gay as a three dollar bill"); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870 (9th Cir. 2001) (harassers referred to male plaintiff as "she" and "her," mocked plaintiff "for walking and carrying his serving tray 'like a woman,' and taunted [plaintiff] in Spanish and English as, among other things, a 'faggot' and a '... female whore'"); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (the "gender stereotype at work here is that 'real' men should date women, and not other men"). As these cases illustrate, non-conforming men, as well as women, have often been branded as homosexual (regardless of their actual sexual orientation) and discriminated against because others have judged them to have flouted conventional expectations for their gender.

The taunts and epithets hurled at the plaintiffs in these employment cases demonstrate the real-world danger of gender stereotyping and assumptions regarding sexual orientation with which they are intertwined. In each case, the "effeminate" male was castigated for being "like a woman" (even to the extent of emphasizing the perceived sexual passivity of the male), and the aggressive female was castigated for being "like a man." In each case, courts properly found that such attempts to drive "effeminate" males and "masculine" females from the workplace were

based on impermissible gender and sexual stereotypes. Similarly, in this case, those who challenge gender stereotypes (by choosing a partner of the same gender) are being excluded from an institution (here, marriage) because including them in that institution would challenge the "traditional" conception of artificially polarized gender roles that suggests that men should dominate women and women should submit, while limiting life opportunities for both.

The connections among enforcement of gender stereotypes, denial of basic rights to lesbians and gay men, and the traditional subordination of women have been drawn by a variety of legal commentators, sociologists, and historians. As Andrew Koppelman explains:

> Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate to one's sex is the imputation of homosexuality. The two stigmas—sex-inappropriateness and homosexuality—are virtually interchangeable, and each is readily used as a metaphor for the other. *Moreover, both stigmas have gender-specific forms that imply that men ought to have power over women.* Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant; they appear to be guilty of some kind of insubordination.

Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 129 (1997) (emphasis added). For example, instances of harassment that emphasize "the feminine sexual passivity" of

women and gay men "have in common the desire of certain 'active' masculine males to drive out of the workplace those they see as contaminating it with the taint of feminine passivity." Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation*, 105 Yale L.J. 1, 7 (1995). The same sex stereotypes act both to devalue women and to demonize gay men. *See* Jo Bennett, *Same-Sex Sexual Harassment*, 6 Law & Sex. 1, 23 (1996) ("because the male sex role is more valued in society than the female sex role ... negative attitudes toward male homosexuals is merely another manifestation of sexism against women").

"Social science research confirms what social experience suggests: a strong aversion to homosexuality is correlated positively with endorsement of traditional sex-based stereotypes." Deborah L. Rhode, *Sex-Based Discrimination*, 5 S. Cal. Rev. L. & Women's Stud. 11, 21 (1995). Indeed, "[t]he conclusion is clear: homosexuals are viewed as sex-role deviants." Jo Bennett, *supra*, at 21. In sociological studies, "gay men were viewed as less rational, analytical, assertive, competitive, and leader-like than heterosexual men. Lesbians were viewed as less affectionate and emotional than heterosexual women." *Id.*

Historical analysis also confirms the connection between sexual orientation and gender, and the devaluation of the female role. "Before about 1700 ... [t]he only [homosexual] males who suffered a loss of status

were adults who took the passive role [in sex]." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 240 (1994). While the idea of sexual passivity as a marker of femininity lived on, the stigma of homosexuality expanded: During the late nineteenth century, "[f]or both men and women, homosexual behavior came to be seen as a manifestation of 'inversion.' Effeminate men or masculine women violated the prescriptions of gender." Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 202.

Fears of homosexuality were linked with Victorian-era resistance to the attempted entrance by the "New Woman" into the formerly male spheres of educational, public, and commercial life. Woman's intrusion was seen as "violat[ing] normal gender categories," as a "fus[ion of] the female and the male," and as "the embodiment of social disorder." Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* 265 (1985). Thus, America's so-called "purity movement" attempted "to reinforce traditional female gender roles in the face of a generation of 'new women,' educated and economically independent of men." William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 20 (1999). Indeed, "[t]he modern stigmatization of homosexuals as violators of gender norms ... developed simultaneously

with widespread anxieties about gender identity in the face of an emerging ideology of gender equality." Koppelman, *supra*, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, at 240. These attitudes, and the gender stereotypes they reflect, persist even today.

IV. Because Denying The Right To Marry To Lesbians And Gay Men Relies On And Enforces Sex Stereotypes, It Is In Direct Conflict With Washington's ERA

The gender stereotyping at issue in DOMA stems from the same source as, and is as invidious as, the stereotyping displayed in the sexual harassment cases described above. In the workplace, we now recognize that punishing women for appearing too "masculine" or men for appearing too "feminine" constitutes sex discrimination. The injury is properly recognized as sex discrimination whether or not the target of such harassment is gay. *See, e.g. Oncale,* 523 U.S. 75 (finding sex discrimination could exist without consideration of sexual orientation).

Denying lesbian and gay couples the freedom to marry similarly enforces a "traditional" family structure that perpetuates gender roles that subordinate women. Indeed, DOMA is perhaps even more invidious than gender-stereotyping discrimination in the workplace because it supports, by operation of law, the stereotyped proposition that women and men cannot live complete or fulfilling lives without finding a mate who is of the "opposite" and "complementary" sex, and then conforming to their

respective "traditional roles" in family life. Nothing illustrates this more than the exaltation of the married different-sex couple:

> [S]exual intimacies are only one piece of the presumption and prescription of heterosexuality. In our culture, the adult heterosexual couple forms the nucleus of networks of social and kinship relations, which are socially supported and privileged. The pleasure most people feel when a single friend forms a close relationship with a congenial person of the opposite sex is not based simply, or even primarily, on an appreciation of erotic or procreative possibilities. Rather, it reflects a broad understanding that life as half of a heterosexual couple is generally easier, and more pleasant and satisfying, in part because dominant prevailing structures of social and family life make it so.

Law, *supra*, at 196. Thus, by denying lesbians and gay men the right to marry their chosen partners, Washington is essentially attempting to coerce them into conforming to gender-stereotyped family roles by depriving them the legal recognition, and the corresponding security, support, and cultural recognition, that are celebrated aspects of marriage.

The notion that marriage, a cherished and fundamental institution, is the exclusive domain of heterosexuals relies on a vision of the family based partly on the preservation of conventional gender norms.[5] Allowing gay men and lesbians to marry "threatens not the family as such, but a

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[5] Testimony by DOMA's proponents makes this explicit. *See* Br. County, 10, 35-37, *citing, e.g.* CP 394 (Hearing on HB 1130 Before the House Law and Justice Comm., Feb. 4, 1988 Agenda at 59-60) (Ed Dolejsi, praising the "two-parent family, which provides the love and example of a woman and a man"); CP 372 (Hearing on HB 1130 Before the House Law and Justice Comm., Feb. 4, 1988 Agenda at 36-37) (Jeff

certain traditional ideology of the family. That ideology is one in which men, but not women, belong in the public world of work and are not so much members as owners of their families, while women, but not men, should rear children, manage homes, and obey their husbands." Andrew Koppelman, *The Miscegenation Analogy*, 98 Yale L.J. 145, 159 (1988).[6] This is the same outdated and stereotype-based ideology that posits the necessity of a mother to nurture and teach sensitivity and a father to discipline and teach assertiveness.[7] Acknowledging for lesbians and gay men the same right to marry and build families that heterosexuals enjoy presents a "challenge to the current system of rewards and penalties that favors masculine, independent, protective, and heterosexual males and feminine, dependent, passive, and heterosexual females." *Sex(ual Orientation) and Title VII*, Note, 91 Colum. L. Rev. 1158, 1170 (1991). Significantly, "[h]omosexuals are a threat to the family only if the survival

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Kemp, extolling the benefits of "the complementary and unique characteristics and qualities men and women bring together in marriage").

[6] As Professor Eskridge has observed, "Social science studies ... emphasize a correlation between antihomosexual feelings and 'a belief in the traditional family ideology, *i.e.*, dominant father, submissive mother, and obedient children[.]'" Eskridge, *supra*, at 1110 (quoting Stephen Morin & Ellen Garfinkle, *Male Homophobia*, 34 J. Soc. Issues 29, 31 (1978)).

[7] Intervenors rely upon this stereotype-based ideology. *See* Br. Intervenors, at 37-43, *citing, e.g.* David Popenoe, *Life Without Father* 144, 146 (1996) ("[F]athers tend to stress competition, challenge, initiative, risk taking and independence. Mothers in their care-taking roles, in contrast, stress emotional security and personal safety.... While mothers provide an important flexibility and sympathy in their discipline, fathers provide ultimate predictability and consistency.")

of the family requires that men and women follow traditional sex roles." Koppelman, *supra, The Miscegenation Analogy*, at 160.

Washington courts, however, have properly rejected legal structures that rely on or enforce the traditional patriarchal family structure. For instance, in *Freehe v. Freehe*, 31 Wn.2d 183, 500 P.2d 771 (1972), this Court abandoned the doctrine of interspousal tort immunity. In doing so, the Court noted that the case establishing the doctrine, *Schultz v. Christopher*, 65 Wn. 496, 118 P. 629 (1911), had relied on "the common-law notion of 'unity' of husband and wife." *Freehe*, 81 Wn.2d at 184. The Court explained that the "traditional" premise of "unity" of husband and wife referred "to a situation, coming on from antiquity, in which a woman's marriage for most purposes rendered her a chattel to her husband." *Id.* at 186. After announcing that "[t]hings have changed," *id.*, the Court concluded that "[m]odern realities do not comport with the traditional 'supposed unity' of husband and wife." *Id.* at 187. Thus, woman's subordination to man in marriage was deemed "no longer a valid premise for a rule of this interspousal disability." *Id.* Similarly, in 1980, this Court held *en banc* that a rule allowing husbands, but not wives, to recover for loss of consortium violated the ERA: "[T]he common-law distinction between husband and wife in regard to consortium is ... based on an unreasonable, discredited concept of the subservience of the wife to

her husband." *Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 96, 614 P.2d 1272 (1980). *See also Smith v. Smith*, 13 Wn. App. 381, 385, 534 P.2d 1033 (1975) (holding that mothers are just as obligated as fathers to support their children financially).

Understanding DOMA as part of a system that supports a dominant male role and subservient female role demonstrates the fallacy of the State's argument that although DOMA *classifies* on the basis of sex, it does not *discriminate* on the basis of sex because the restriction on marriage applies equally to both men and women. Br. County, at 49; Br. State, at 43-45; Br. Intervenors, at 48-49. Such logic was put to rest decades ago by the U.S. Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed.2d 1010 (1967), where the Court recognized that the ban on mixed-race marriages was "designed to maintain White Supremacy[,]" and worked an "invidious discrimination" despite its equal application. *Id.* at 11. DOMA is an expression of a comparably "invidious" discrimination.[8] As Andrew Koppelman explains, just as "the

[8] This Court should recognize the error of *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974), in which the court dismissed the analogy to prohibiting mixed-race marriage based on the specious reasoning that, by definition, marriage is between a man and a woman. While the *Singer* court acknowledged that *Loving* was correctly decided, it failed to recognize the connection between the denial of the right to marry to lesbian and gay couples and the kind of invidious discrimination rejected by *Loving*. *Loving* challenged a "traditional" understanding of marriage as necessarily involving members of the same race. This case challenges a "traditional" understanding of marriage as necessarily involving members of opposite sexes. In *Loving*, the prohibition was discriminatory because, although applied "equally," it perpetuated an unequal

harm to blacks counts against the miscegenation laws, then for the same reasons, the harm to women should count against antigay laws." Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 U.C.L.A. L. Rev. 519, 529 (2001). Even though DOMA restricts women and men alike, the restriction perpetuates the subservient position of women by bolstering a system in which men are expected to conform to "masculine" ideals and women to "feminine" ideals. It is precisely these stereotypical expectations, and the outmoded stratification of the genders that they enforce, that Washington's ERA prohibits.

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Respondents, this Court should affirm Judges Downing and Hicks and order the State to issue marriage licenses to the Respondent couples.

DATED this 7th day of February, 2005.

Respectfully submitted,
THE BLANKENSHIP LAW FIRM, P.S.
By: _____
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stratification of the races; here, although applied "equally," DOMA perpetuates an unequal stratification of the sexes. *See Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003) ("As it did in . . . *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination."); *Baker v. State*, 744 A.2d 864, 885 (Vt. 1999) ("history cannot provide a legitimate basis for continued unequal application of the law").

APPENDIX 1

STATEMENTS OF INTEREST

Amici curiae offer the following statements of interest.

Legal Momentum is the new name of NOW Legal Defense and Education Fund, a leading national non-profit women's and civil rights organization that for over thirty years has used the power of the law to advance the rights of women and girls. Legal Momentum is dedicated to protecting the right of all women and men to live and work free of government-enforced gender stereotypes. As part of this mission, Legal Momentum has consistently supported the right of lesbians and gay men to be free from discrimination.

Legal Momentum submits this brief in order to share with the Court its expertise concerning the issue of sex stereotyping, which is at the core of this case and of Legal Momentum's mission. Legal Momentum has consistently identified and debunked legal constructs based on gender stereotypes. Accordingly, Legal Momentum has an interest in exposing the way in which restricting marriage to opposite-sex couples relies on outmoded, stereotypical, and constitutionally impermissible conceptions of gender.

The California Women's Law Center (CWLC) is a nonprofit law and policy center that works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic and political constraints. CWLC's Issue Priorities are sex discrimination, violence against women, women's health, race and gender, exploitation of women, and women's economic security. CWLC is firmly committed to eradicating invidious discrimination in all forms, and eliminating laws that reinforce traditional gender roles. The nexus of gender and sexuality discrimination produced by anti-same-sex marriage acts, such as Washington's Defense of Marriage Act

("DOMA"), raises questions within the expertise and concern of CWLC.

The National Organization for Women's (NOW) purpose is to take action to bring women into full participation in the mainstream of American society now, exercising all privileges and responsibilities thereof in truly equal partnership with men. This purpose includes, but is not limited to, equal rights and responsibilities in all aspects of citizenship, public service, employment, education, and family life, and it includes freedom from discrimination because of race, ethnic origin, age, marital status, sexual preference/orientation, or parenthood.

All couples, lesbian and gay and heterosexual, deserve the legal protections afforded by marriage. Currently, same-sex couples in committed relationships are likely to pay higher taxes than married couples. They receive no Social Security survivor benefits upon the death of a partner despite paying payroll taxes. They are denied healthcare, disability, military and other benefits afforded to heterosexual couples. Without a will, they often pay estate taxes when a partner dies, including significant tax penalties when they inherit a 401K pension plan from a partner. They are denied family leave under the Family and Medical Leave Act. Women will not achieve equality until every woman can pursue her dreams free from all forms of discrimination.

The Women's Law Project is a nonprofit feminist legal advocacy organization based in Philadelphia and Pittsburgh. Founded in 1974, the Law Project has a long history of advocacy on behalf of lesbian parents and their children. The Law Project served as counsel to *amici curiae* in the Pennsylvania Supreme Court in two recent cases recognizing second-parent adoption and third-party standing of same-sex co-parents to petition for visitation. In addition, the Law Project has successfully advocated against

proposed state legislation that would have prohibited the recognition of domestic partnerships.