HONORABLE WILLIAM DOWNING
Date of Hearing: June 11, 2004

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HEATHER ANDERSEN et al.

Plaintiffs,

vs.

RON SIMS, et al.,

Defendants,

and

RON SIMS, et al.

Third-Party Plaintiffs,

vs.

STATE OF WASHINGTON,

Third Party Defendant.

NO. 04-2-04964-4SEA

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs are eight same-sex couples who have been denied the right to marry. Each couple is in a long-term, loving relationship. Some couples are male, some female. Some are raising children, some are not. Some have been married in religious ceremonies, others have pledged their love and devotion in private ceremonies of commitment. All have been denied a marriage license by King County.

This denial deprives plaintiffs, and thousands of King County couples like them, of myriad benefits and responsibilities that are the privileges and duties of married life. In hundreds of laws, the State treats married and unmarried persons differently. Marriage affects the ownership of property, the accrual of income, the delineation of employment benefits, the duty to pay debts, the right to control medical treatment, the inheritance of property, and the rights and obligations of parents. It permits one spouse to act for the other throughout the many transactions that comprise modern life, and it imposes a duty of mutual support and loyalty that serves society and protects the couples who are permitted to marry. Denying same-sex couples the protection of our state's family law forces them to spend more money, take more risks, suffer more uncertainty and endure more hardship than other couples.

But marriage is not merely a bundle of legal rights and duties. For two people who have found joy in each other, it can be a definitive expression of love, devotion and dedication. It allows each to honor the other by declaring before friends and family how deeply the other is cherished. For many, the rituals convey core beliefs. The act of marriage itself serves as rite of passage from one phase of life to the next. Marriage governs how couples fit into their communities, how they are perceived by colleagues, by friends, by family, by their children, and even by each other. Denying couples the right to marry forecloses one of life's most personal choices, and deprives them of the most effective means to show another that she or he is inexpressibly precious and utterly irreplaceable.

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Denial of marriage makes gay and lesbian couples second-class citizens and stamps them and their children with the badge of inferiority. The denial subordinates this minority group based on archaic stereotypes and offends the Washington Constitution in multiple interrelated ways. It denies liberty and equality senselessly: not one legitimate state purpose is served by preventing these couples from marrying.

Plaintiffs ask the court to right this wrong by holding that denying them the right to marry is unconstitutional, and by directing the defendants to issue them marriage licenses.

II. STATEMENT OF FACTS

A. The Plaintiffs And Their Families.

Plaintiffs Johanna Bender and Sherri Kokx have two young sons: Zachary, age three years and Quintin, age four months.[1] Johanna, a lawyer, and Sherri, a middle school science teacher, met in 1996, fell in love and eventually committed their lives to each other. They bought a house in 1998 and planned a family. They decided that Sherri would give birth first, and in 2000 Zach arrived.

In the eyes of the law, Johanna did not automatically become Zach's parent; she had to adopt the child that she and Sherri had planned and brought into the world. Fortunately for this young couple, Johanna's mother is a lawyer who was willing and able to do all the paperwork for free. But Johanna and Sherri still had to pay the court costs, and pay for the services of a social worker who inspected their home and interrogated Johanna on her fitness to be a parent, just as if she were a stranger to her own child. The time-consuming and demeaning home study process required Johanna, among other things, to undergo a criminal background check, to ask friends to write letters of recommendation for her, and to obtain a physician's certification of her mental and physical health. If she had been allowed to marry Sherri before Zach's birth, Johanna would not have been put to the expense and gross indignity of

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having her life examined in detail, let alone the anxiety of not having a legal tie to Zach during the lengthy adoption process and the fear that her son could have been considered an orphan in the eyes of the law if Sherri had died at any time before the adoption was finally completed.

Johanna and Sherri's second son, Quin, arrived just four months ago. This time it was Johanna who gave birth and Sherri who had to endure the probing personal questions of the social worker and the indignity of the criminal background check in order to adopt, despite the fact that she and Johanna already had one child together. When Quin was just three weeks old, Johanna and Sherri were reminded of the special obstacles they had to overcome to protect their son. Quin became sick, had difficulty breathing, and had to be rushed to the hospital. The young couple was forced to explain over and over again to emergency medical workers that they were both Quin's parents to the point of delaying the ambulance while the paramedics figured out how to fill out the paperwork. This experience – nerve-wracking for any parents of a newborn – was doubly frightening to Johanna and Sherri because it reminded them how easily Sherri could be shut out of medical decision-making if Johanna were not available to affirm Sherri's status as Quin's other parent.

Johanna and Sherri "are fighting this battle in part for our sons. [They] want them to know how important it is to their mama and mommy that their family be treated with respect not only by individuals, but by the state in which we live." Kokx Decl. at ¶ 15.

Plaintiffs Beth Reis and Barbara Steele have raised Barbara's three youngest children together. They were five, six and nine years old when Beth and Barbara committed to share their lives with each other in 1977. The couple could not afford the expense of Beth's legally adopting the children, and in any event adoption was not available to lesbian couples in the seventies. But that did not prevent Beth from raising the kids as her own.

[1] Unless otherwise indicated, this section relies on the declarations of the various plaintiffs.

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Beth and Barbara's first declaration of their everlasting commitment was made in "a private ceremony just between the two of [them] and God," as such declarations usually were for lesbian couples back then. Reis/Steele Decl. at ¶ 13. They said those first vows in their car on the shoulder of a highway with the children asleep in the back seat. By their 20th anniversary in 1997, times had changed enough for Beth and Barbara to invite 175 family members and friends to join them in a public wedding celebration. This time they stood under a *chuppah*, in honor of Beth's Jewish heritage, and performed a ceremony that would have been familiar to Barbara's African American ancestors. Before the law recognized marriages between two slaves, the slave community blessed a union when the couple jumped across a broom together. In a revival of this tradition, Barbara and Beth "jumped the broom" into a marriage recognized by all those assembled, but like the marriages of Barbara's forebears, not by their government.

In the last 27 years, Beth and Barbara have raised their children to adulthood, seen the birth of their eleven grandchildren and one great-grandchild, and cared together for their aging and ill parents. In 1990 when Beth's mother was ill with lung cancer, they bathed her, brushed her hair and stayed up nights with her until she died the next year. In 1996, Barbara's mother had a massive stroke. Beth and Barbara moved her to Seattle, bought a bigger home suitable for a disabled person, and cared for her until 2000 when additional strokes required her to enter a nursing home. Beth's father moved in with Beth and Barbara after having his knee replaced in 1999 and has lived with them since.

Beth and Barbara have what is most important - a loving family. They are Grandma Beth and Grandma Barb to all eleven of their grandchildren and to their great grandson Joseph. But as they stand at the threshold of retirement, anticipating the physical and financial challenges that come with aging, they know they are vulnerable in myriad ways because the State refuses to recognize the union that for many years has formed the foundation of their extended family.

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Barbara is a State employee, but if she dies, Beth will be denied the "Death In Service Survivor's Benefit" she would get if they were married. If Beth dies first, Barbara will be denied the social security earned by Beth, and normally paid to a surviving spouse. Beth's benefit is much higher than Barbara's own benefit, so this results in a significant loss of retirement income.[2] They have not yet been able to afford long-term care insurance, partly because not being married means the premium would be $2000 to $3000 more per year than it otherwise would be. In addition, they face more acutely the uncertainty and anxiety about being able to take care of each other in medical emergencies than do married couples. Having suffered through problems with medical care for their children and grandchildren from doctors and hospital staff refusing to understand their family relationship, Beth and Barbara are scrupulously careful to carry legal documents with them when they travel, including durable powers of attorney, living wills, and "hospital visitation authorizations," even though they know these documents may not be sufficient to ensure that their wishes are respected if they face hostile or confused hospital staff.

Plaintiffs Michelle Esguerra, 27, and Boo Torres de Esguerra, 25, are just starting out in life. They've exchanged rings, Boo has added Michelle's last name to her own, and they are planning a ceremony this summer to solemnize their union before family and friends. They have registered as domestic partners in Seattle, even though this is mostly symbolic.

Michelle and Boo's inability to marry causes them many financial and social challenges not faced by married couples. Boo is an apprentice electrician, and while she has good health insurance coverage through her employer, she is not able to cover Michelle under her policy although the company provides coverage to married spouses and other dependents for free. The young couple paid the premiums necessary to keep Michelle covered under her former employer's policy as long as they could

[2] State marriage law is the gateway to federal benefits and protections, such as income tax benefits and social security benefits; couples cannot address the discrimination against them at the federal level until they are married under state law.

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afford it, but since December of last year, Michelle has been uninsured. They both pray for Michelle's continued good health.

Michelle and Boo placed title to their home in both their names and Boo has named Michelle as beneficiary on her pension plan. They have not been able to afford other protections such as wills, health care directives, or medical powers of attorney. They are forced to rely on the good will of their families if misfortune strikes before they can find the money to secure the limited legal protections that are available to them. They live with the anxiety of knowing medical staff could refuse to recognize their family status.

Boo and Michelle are treated differently from heterosexual couples, even within their own extended family. While other in-laws are welcomed immediately as relatives, and Boo's brother's brand-new girlfriend receives the title "auntie" from her nieces and nephews, Michelle, even after five years in the family, is still called just by her first name. Their inability to marry puts a subtle but real distance between the couple and their extended family. Michelle and Boo also want to marry for the children they plan to have together, to assure them that their parents' commitment to each other isn't weaker or less important than married couples.

Plaintiffs Heather Andersen and Leslie Christian have been together since 1990. They could not be happier with each other, but for Leslie's mom, acceptance has been hard won. She had no experience with openly gay couples and no context into which to put her daughter's relationship. Eventually, her mom accepted the couple, and now Leslie's brothers and sisters and nieces and nephews are part of their family. Heather has had her family challenges, too. Although most of her family welcomes Leslie, her oldest brother was virulently homophobic. Heather was not able to talk with him about her relationship with Leslie until after he had been diagnosed with terminal cancer. Heather served as one of her

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brother's main caregivers during the months before his death, and both Heather and Leslie remain close to his children and grandchildren, whom they consider part of their family.

Heather and Leslie are both professional women in their fifties who have access to lawyers and the means to pay them, so they have secured the limited protections the law permits them to obtain through private contracts. But their relative affluence does not shield them from discrimination or the pervasive legal difficulties caused by their inability to marry. While she was making a presentation on AIDS education, the paint and tires of Heather's rental car were vandalized. As Heather sees it, those vandals and others like them were given comfort by the state-sanctioned discrimination challenged here: "I believe that when government is free to discriminate against us in this basic way, it sends a message to the public, and to individuals, that discrimination is acceptable." Andersen Decl. at ¶ 19.

The state's refusal to allow them to marry does more than just encourage prejudice. Leslie cannot cover Heather through her employer-sponsored health insurance plan and they must pay to purchase an individual policy for Heather. They are not treated as a family by car rental companies, airlines, or health clubs, and thus must pay more to purchase these services than similarly-situated married couples. They also are painfully aware of the additional difficulties they will face caring for each other as they age. Heather had major surgery in 1999, and they both worry about what would happen if either of them had a medical emergency while traveling and were not recognized as each other's next of kin or allowed to make medical decisions for one another.

Plaintiffs David and Michael Serkin-Poole have been in a committed, loving relationship for nearly 23 years. David is a Cantor, a member of the Jewish clergy with the authority to conduct religious services and to marry others. Michael has been at home full time since 1991 caring for their family.

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Beginning in 1989, David and Michael have opened their hearts and lives, in a way few do, to children in need. They have adopted, cared for, and raised three children with disabilities. Their oldest was a victim of fetal alcohol syndrome; the two youngest are developmentally disabled and each began life in an abusive home. When Jason, their middle child, was unable to speak as a result of birth defects, David and Michael taught him sign language. The couple's devotion to their children has had remarkable results. All three are adults now and are either working in regular jobs or in school. They are dearly loved by David and Michael's extended family, including Michael's mother who considers them her grandchildren every bit as much as her other "biological" grandchildren. Cowing Decl. ¶ 4.

Michael's mother is proud of David and Michael's commitment to each other, and believes them to be "married" in every possible way, "except that they don't have the piece of paper that our government requires in order to reap all of the rights, privileges and above all, respect, that they deserve." Cowing Decl. ¶ 5. For most of the years that Michael stayed home to care for the couple's children, David could not cover Michael under his health insurance through work, and they had to pay for an individual policy for Michael, at double the premium for less coverage. Because they do not have access to the legal protections of marriage, they have had to pay thousands of dollars to attorneys for various legal documents to protect each other and provide for their children in the event of death, incapacity, or dissolution.

When several provinces in Canada began to allow same-sex couples to marry legally, David and Michael bought wedding rings and considered going to British Columbia to wed. But they have decided against that option. They are keeping those rings in their boxes until they can be legally married in their own community, in the presence of their three children and their many friends.

Plaintiffs David Shull and Peter Ilgenfritz, who have been together over eighteen years, know a great deal about marriage. They know religious marriage personally; they were married themselves ten

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years ago in a ceremony at St. Pauls United Church of Christ in Chicago. They also know religious marriage professionally; David and Peter, who met while studying at Yale Divinity School, are co-pastors of the University Congregational United Church of Christ in Seattle, and routinely conduct both religious and legal marriage ceremonies for other couples.

They also know and accept that different religions view the issue of marriage between individuals of the same sex in different ways. David was once ordained in the Presbyterian Church, but it strictly forbade same-sex relationships involving clergy or lay leaders. Since his relationship with Peter put him in conflict with Presbyterian teaching, he gave up his vocation as a parish pastor so he could keep his commitment to Peter. This very difficult period of his life ended when he and Peter were called to be pastors of the University Congregational United Church of Christ, which supports and celebrates the relationship David shares with Peter.

The couple's extended family also affirms their marriage, and honors the gifts of loving faithfulness that "Uncle Peter and Uncle Dave" bring to their nieces and nephews. Gordon Shull Decl., ¶ 3, and Ex. A. Yet Peter and David have no children of their own. When they were younger and living in Chicago, Peter and David wanted to be parents and investigated adoption. However, Illinois at that time would not permit same-sex couples to adopt. Times have changed, but now in mid-life, David and Peter have recognized that the time to start a family has come and gone for them. They might well have raised a family of their own if their home state's adoption law viewed gay couples 15 years ago the way Washington's does today.

From David's pastoral experience comes a deep understanding of the pain of exclusion. "I have seen how such treatment erodes self-esteem and confidence like the slow drip-drip-drip of water that after a time has the power to eat through the hardest rock." Shull Decl. at ¶17. Peter sees the law discouraging long-term commitment: "[W]hen the State tells Dave and me that our relationship is not

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worthy of being considered a marriage, we hear the State saying we shouldn't form a committed relationship, and that there is no social good that can come from us making a lifelong commitment to each other." Ilgenfritz Decl. at ¶ 19.

Plaintiffs Vaijayanthimala ("Mala") Nagarajan and Vegavahini ("Vega") Subramaniam are South Asian American women. Their families were originally from India, but both Vega and Mala were raised in the United States from the time they were young. The couple met in Bellingham in 1996, and by 1998 they had fallen in love. Soon they were planning to marry. Although neither is religious, they feel a strong connection to their Indian heritage, so they decided to marry in a Hindu ceremony. Part of their reasons for following important Indian traditions was that centuries ago same-sex relationships were honored in India: "We both have studied Indian history and appreciate that, centuries ago, same-sex relationships were accepted and honored within that culture. Carvings on the temples celebrate same-sex pairings, as well as different-sex pairings." Nagarajan Decl. at ¶ 15.

Mala and Vega spent a day in counseling with the Hindu priest who married them and with his wife, both of whom welcomed the engaged couple warmly into their home. At one point, the priest apologized and told them what they already knew: "I don't think King County will allow me to sign a license for you." Although the government did not sanction the wedding, most of Mala and Vega's family cherished it:

> My [Mala's] mother was central in the religious rituals of the ceremony, and Vega's father played the same role he would have had she been marrying a man. My oldest sister Vijaya's twins carried garlands to us, and Usha's daughter Sahana was our ring bearer. Both of my brothers-in-law participated, and Vega's brother Sriram gave a beautiful toast. Vijaya was our mistress of ceremonies, and Usha gave an endearing toast via tape since she was not able to make it in person due to her high risk pregnancy. We had 155 guests – a magnificent mix of religions, cultures, and ages, with gay and non-gay people, lots of children, and many childhood friends and relatives.

Id. at ¶ 20.

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Sadly, two important people were absent, Mala's father and Vega's mother, neither of whom approve of their relationship. Mala's parents were the products of an arranged marriage, which was the norm in India when they were young. But attitudes towards marriage do change, and Mala's sisters, like Mala, all have marriages of love rather than arrangement. Yet Mala's father admits he is part of the older generation, and finds it particularly hard to adjust to the change represented by Mala's bonding with Vega. Vega's mother is also a captive of her past, and refuses to recognize Vega and Mala's union as being of the same worth as a legal marriage: "[Mom] continue[s] to suggest we should not be together and says our marriage was not "real," followed by the rhetorical inquiry whether our marriage is respected by the government." Subramanian Decl. at ¶ 18.

Mala and Vega have firsthand knowledge of the ways large and small that the government's failure to license their union affects their lives. Vega was denied unemployment insurance when she followed Mala to Olympia to take a better job, something that would not happen to a married couple, and Vega was uninsured for the entire time she lived in Olympia because Mala's health plan did not cover domestic partners. Recently, when Vega agreed to become a bone marrow donor, and had to undergo surgery, the hospital staff's lack of receptivity when Vega designated Mala as her health care decision-maker underscored the precariousness of their status at precisely the moment when couples most need security.

Plaintiffs Janet Helson and Betty Lundquist joke that their first date, which started while they were trekking in Nepal, lasted five weeks. That was 13 years ago. Since then they have been foster parents to four teenagers. Ironically, to be licensed as foster parents, the State treated Janet and Betty as if they were married, allowing that only one of them meet several of the foster care requirements (learning CPR, for example). After caring for foster children for several years, Janet and Betty wanted children of their own. When it became clear that their former foster son and his young girlfriend were

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unable to adequately care for their biological child, Tyler, Janet and Betty offered their home and their hearts, and eventually obtained legal custody.

Tyler, who is now eight, continues to see his birth parents, although it is difficult to imagine what his life would have been like if he had remained in their care. He is an avid reader, is in an accelerated learning program at school, plays soccer and baseball, and takes karate lessons. Three years ago, Janet and Betty expanded their family once again by jointly adopting their daughter Zora, who was born out of state. Janet, Betty and Tyler flew overnight to Zora's birth state in order to begin taking care of her immediately. After returning home, the family made the decision for Betty to quit her job and stay home to provide full time care to both children. Zora and Tyler both call Janet "mommy" and Betty "mama."

Janet, a lawyer, and Betty, an accountant and bookkeeper, have the knowledge and financial resources to cobble together the protections that are available to secure their family against misfortune, although it has cost them thousands of dollars to do so. But their best efforts fall far short of the security and stability that marriage would provide for them and for their children. Estate planning is more complicated and uncertain; if one of them dies or becomes disabled, the other is not eligible for social security benefits, leaving their children more vulnerable; and they worry about accidents or serious health problems for them or their children when their family relationship might not be recognized by medical workers.

Janet and Betty also want to marry to give their children clarity about their parents' relationship, a simple way of explaining it to friends and schoolmates, and something solid to fall back on when they encounter homophobia. The couple believes that their inability to marry teaches their children that state-sanctioned discrimination is permissible: "The fact that our government will not allow us to marry sends the message that our relationship and our family is not valued by our government – that we are not

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equals with the same rights as everyone else." Helson/Lundquist Decl. ¶ 23. They do not want this discriminatory message to continue for their children's generation. Like most American parents, Janet and Betty want to provide their children with a better world in which to grow, as well as the financial protection and social status that are offered by civil marriage.

All plaintiffs have applied for licenses to marry. Each couple has tendered the required fee and is fully qualified under Washington law but for the fact that they are couples of the same sex. All plaintiffs have been denied licenses to marry solely because they seek to marry someone of the same sex.

B. The Defendants.

Defendants are all sued in their official capacities. Defendant Ron Sims serves as the Executive of King County. He has appointed defendant Dean Logan as the Director of the King County Records, Elections and Licensing Services Division, and that office is responsible for granting or denying marriage licenses. Mr. Sims instructed Mr. Logan and his staff to deny plaintiffs' marriage licenses in compliance with the law that defines marriage exclusively as a union between a man and a woman.[3] While Mr. Sims feels compelled by his role as the King County Executive to enforce this law, he personally believes that same-sex couples should be allowed to marry. Answer to Amended Complaint at ¶ 19.

The defendants have filed a third-party complaint asserting that the State of Washington is potentially liable to the defendants for fees and costs. The King County defendants and the State have answered the complaint and contend that the exclusion of same-sex couples from marriage is valid.

[3] Defendant Cheryle A. Broom is King County Auditor. Although she does not have a role in granting or denying marriage licenses, she is named as a defendant because the statute governing challenges to marriage license denials requires the County Auditor to be named. RCW 26.04.190.

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C. Gay and Lesbian Couples in Washington.

The plaintiffs in this lawsuit are only a few of the thousands of lesbian and gay couples living in King County. Households headed by same-sex couples are found in every county in Washington, and span the range of income, age, race and other demographic indicators. Declaration of Marieka Klawitter, Ph.D., ¶¶ 14-20. While almost certainly a significant undercount, the 2000 U.S. Census reported that at least 15,900 same-sex couples make their home in Washington. *Id.* They work in all manner of jobs, pay taxes, and struggle to care for each other just as do their married, heterosexual neighbors and co-workers. *Id.*¶¶ 12, 21. Approximately one quarter of these couples are raising children. *Id.* ¶ 22.

Although Washington's marriage restriction continues to exclude families headed by gay and lesbian couples from the full protection of the state's family law system, the existence of these couples and their children cannot be denied. As the plaintiffs here demonstrate, gay men and lesbians become parents in a variety of ways, including having children during previous heterosexual relationships, adopting either as single parents or jointly as domestic partners, giving birth through various assisted reproduction methods, and through the foster care system.[4]

The fact that gay and lesbian couples and their families need legal protections of various sorts has been recognized for decades in different ways within Washington. State courts have been expressly critical of *per se* exclusions of gay people from doctrines that protect family relationships. *See, e.g., In re Cabalquinto,* 100 Wn.2d 325, 329, 669 P.2d 886 (1983) (parent's homosexual orientation did not

[4]Gay men and lesbians have been approved as adoptive parents in King County since the mid-1980's, either as single parents or jointly as domestic partners. These adoptions may be arranged independently, through a private adoption agency, or through a public agency such as the Washington Department of Social and Health Services (DSHS). Wechsler Decl. ¶ 2. DSHS has also licensed gay and lesbian individuals and couples to serve as foster parents for the same time period. *Id.* ¶ 3. Second-parent adoptions by the same-sex partners of birth parents have been approved in Washington since the late 1980s, and those adoptions are now routinely done using the pre-existing "step-parent adoption" procedure. Hundreds, if not

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support per se denial of visitation); *Wicklund v. Wicklund*, 84 Wn.App.763, 770, 932 P.2d 652 (1996) (same). Washington State itself provides family benefits to its gay and lesbian workers,[5] as do a number of municipal governments in various parts of the state.[6]

Nevertheless, in 1998 the Washington Legislature passed the so-called Defense of Marriage Act (DOMA), explicitly excluding same-sex couples from civil marriage, which is the simplest, most complete legal device regulating both the protections and obligations of state family law.[7] Accordingly, as demonstrated by the plaintiffs here, gay and lesbian couples must resort to more difficult, complicated contractual relationships or common law equitable remedies, which are both more expensive and provide less comprehensive protections than civil marriage. *See, e.g.*, DuCharme Decl.; Rita Bender Decl. Despite being similarly situated to different sex couples in all relevant respects, the daily lives of gay and lesbian couples, and their ability to provide for their children and other dependents, are made incalculably harder because Washington refuses to acknowledge that they are families.

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thousands, of second-parent adoptions have been completed in King County over the last ten years. *Id.* ¶ 5 (family law attorney personally representing gay and lesbian clients in over 250 second-parent adoptions).

[5] Health Care Authority, Public Employees Benefits Board's 2000-2001 Annual Report" , <http://www.hca.wa.gov/annualreport/2001/arpebb.shtml>. See also, *Benefits for Gay Partners Rids State of a Catch-22*, Seattle Post-Intelligencer, May 26, 2000, at A18; Public Employees Benefits Board, *Domestic Partner Coverage Q&A* (May 23, 2000) <http://www.wa.gov:80/hca/ PEBB.htm>. State agencies also operate under a Governor's Executive Order barring sexual orientation discrimination in state employment. Executive Order 93-07 "Affirming Commitment to Diversity . . ." <<http://www.governor.wa.gov/eo/eoarchive/eo93-07.htm>>

[6] Washington cities and counties offering a domestic partnership registry and/or domestic partner benefits for government employees include Burien, King County, Lacey, Olympia, Seattle, Snohomish County, Tumwater, and Vancouver. *See generally* Human Rights Campaign, Work Life, Domestic Partner Benefits, available at http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/WorkplacePolicySearch.cfm&DPHealth=local&submitted=1&refresh=1.

[7] In doing so, the Legislature acted with a clear display of anti-gay animus and religious intolerance. *See, e.g., Editorial: Legislative Hot Talk,* Seattle Times, Feb. 10, 1998, at B4 (Rep. Mike Sherstad, R-Kenmore: "Homosexuality in its action is so repugnant to people…we don't understand how people could engage in it."); *House Passes Ban on Gay Marriages – Backers Say Bill Defends God's Choice*, at B1 (Rep. John Koster, R-Sultan, head of the Washington Conservative Caucus: "Who are we to redefine what God has ordained and established?")

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D. The Legal Benefits Conferred By Marriage.

The Washington legislature has granted a number of important benefits to married persons. Among these are: (1) community property, RCW 26.16; (2) protections for those who receive insurance benefits through their spouse, RCW 48.44; (3) certain state tax benefits, such as an exemption from real estate excise tax for transfers made from one spouse to another, RCW 82.45; (4) the right and duty not to testify against a spouse in most legal proceedings, RCW 5.60.060; (5) the right to state-supervised dissolution of the relationship and distribution of assets, RCW 26.09; (6) rights on the death of a spouse, including the right to control autopsies and organ donations and to be buried next to one's spouse, RCW 68.32; (7) inheritance rights, whether under the laws of intestacy, RCW 11.04, or overriding certain elections by testators, RCW 11.28; and (8) the right to bring a wrongful death action, RCW 4.20.[8]

Marriage can also diminish an entitlement to certain public benefits for those who choose to enter into it. On any number of statutes in which the income of those covered is important, there are different scales for married people and single people. These include rules governing garnishment, RCW 6.15; eligibility for a subsidy in the state Basic Health Plan, RCW 70.47.020; and eligibility for senior

[8] Other benefits may be critical for certain classes of people. For example, spouses of public employees, including teachers, state patrol, police, firefighters, judges, and other civil servants have important pension benefits. Certain business licenses, including insurance agent licenses, RCW 48.17, liquor licenses, RCW 66.24, and various fishing licenses, RCW 75.30, and gas station franchises, RCW 19.120, pass automatically to the surviving spouses of licensees or franchisees. The spouses of indigent veterans are entitled to various forms of public assistance, RCW 73.04, and the spouses of graduate students at public universities are entitled to have their health insurance benefits paid. RCW 28B.10.

The legislature has also chosen to use marriage as a proxy for "close relationship" to protect the public from fraud or nepotism. Examples of such statutes include those requiring that public members of various professional licensing boards not be married to members of the regulated profession, e.g. RCW 18.118.020(10); forbidding spouses of lottery employees or officials from participating in the state lottery, RCW 67.70.180; and requiring professional fundraisers to make a disclosure if married to an officer of an entity that will receive 10% or more of the fundraising proceeds, RCW 19.09(2)(h).

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citizen campsite rental discounts, RCW 79A.05.065. All told, hundreds of statutes grant rights or impose burdens depending, at least in part, on whether one is married.[9]

III. STATEMENT OF ISSUES

Are the prohibition of marriage "[w]hen the parties are other than a male and a female," *see* RCW 26.04.020(1)(c), and all other provisions of Washington statutory or case law that prevent marriage between otherwise qualified persons of the same sex, void for violation of the following provisions of the Washington Constitution, each of which must be interpreted with due regard to the admonishment that a "frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Const art. I, § 32:

1. The guarantee that "[n]o law shall be passed granting to any citizen [or] class of citizens . . . privileges or immunities which upon the same terms shall not equally belong to all citizens." Const. art I, §12.

2. The guarantee that "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex." Const. art. XXXI, § 1.

3. The guarantee that "[n]o person shall be deprived of life, liberty, or property, without due process of law," Const. art. I, § 3, the guarantee that "[n]o person shall be disturbed in his private affairs . . . without authority of law," Const. art. I § 7, and the right to intimate association that arises out of Const. art. I §§ 3 & 7.

[9] The state-regulated status of civil marriage is also the gateway to over 1,100 federal benefits and burdens, for example, deductions and rates for income taxation and qualification for social security benefits. U.S. General Accounting Office, Defense of Marriage Act, GAO-04-353R (January 23, 2004) (report calculating 1,138 federal statutes that distinguish rights, benefits, and obligations based on marital status), available at http://www.gao.gov/new.items/d04353r.pdf; Cott Decl. at ¶ 5.

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IV. EVIDENCE RELIED UPON

Plaintiffs rely on the following declarations: Heather Andersen; Leslie Christian; Peter Ilgenfritz; David Shull; Johanna Bender; Sherri Kokx; Joint Declaration of Janet Helson and Betty Lundquist; Joint Declaration of Michael and David Serkin-Poole; Vegavahini Subramaniam; Vaijayanthimala Nagarajan; Joint Declaration of Elizabeth "Beth" Reis and Barbara Steele; Michelle Esguerra; Boo Torres de Esguerra; Rita Bender; Irene Cowing; Nancy F. Cott, Ph.D.; Elaine DuCharme; Marieka Klawitter, Ph.D.; Shane Rock; Gordon Shull; and, Barbara J. Wechsler.

V. ARGUMENT SUMMARY

The right to marry is one of the most precious rights we have, and our courts give it the highest degree of protection. But this was not always so. At one time slaves could not marry. When slavery was abolished, laws sprang up prohibiting men and women from marrying across racial lines. Finally that restriction was found offensive and abolished. Now lesbians and gay men are denied the right to marry. In Washington this right is denied by statute, as well as by a 30 year-old Court of Appeals decision.[10]

The law and our attitudes toward same-sex relationships have both evolved tremendously in the last 30 years. Central to this evolution is that gay men and lesbians have been living together openly as couples, buying homes, raising families and in general doing the things that all couples do. They conceive and adopt children, act as foster parents, and go to court to resolve disputes when their relationships end, as some inevitably will do. As same-sex couples have openly taken their place in our society, it has become more and more obvious that excluding them from the benefits of and the obligations imposed by marriage is irrational, inequitable and unjustifiable.

[10] *See* RCW 26.04.010 & .020(1)(c) and *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974).

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Washington constitutional jurisprudence has changed substantially in the last 30 years as well. In a line of cases beginning in 1986 and culminating in a case decided just a few months ago, the Washington Supreme Court has carved out an enhanced protection for Washington citizens when the privileges and immunities of citizenship are denied to one class of citizens while being extended to others.[11] Washington's privileges and immunities clause demands a level of protection against unequal treatment more stringent than the protection provided by the Equal Protection Clause of the Fourteenth Amendment. The law requires compelling reasons to restrict the right to marry because that right is a core liberty interest protected by the due process clause. Where the government seeks to restrict the right to marry along gender lines, and seeks to discriminate against gay men and women, a class that has often been the subject of stereotyping and prejudice, the reasons offered by the state in support of its restriction are especially suspect. The reasons proffered for the marriage prohibition must be closely examined with heightened scrutiny and any restriction of marriage rights must be narrowly tailored so this precious privilege is not improperly abridged.

Washington's marriage prohibition is plainly unable to withstand this or any other level of scrutiny. There are no legitimate reasons, compelling or otherwise, that support the prohibition, and the prohibition is not narrowly drawn; instead, it is boundless and broad. This court should hold that the law prohibiting same-sex couples from marrying is unconstitutional, and it should direct the defendants to issue marriage licenses to plaintiffs.

VI. ARGUMENT

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (*quoting Skinner v. Oklahoma*, 316 U.S. 535, 541

[11] *See State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986);*Grant County Fire Protection District v. City of Moses Lake*, 150 Wn. 2d. 791, 806, 83 P.3d 419 (2004).

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(1942)). Chief Justice Earl Warren wrote those words as a unanimous Court finally struck down our nation's anti-miscegenation laws in 1967. The Court was reversing a one-year jail sentence handed down to Richard Loving, a White man, and Mildred Jeter, an African American woman, who in violation of Virginia law had married. The Virginia trial judge, in the 1959 opinion that was set aside by the Supreme Court, had written:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Loving, 388 U.S. at 3 (internal quotation omitted).

Today, Justice Warren's opinion seems self-evident, and the trial judge's ruling seems hopelessly bigoted. But 45 years ago the trial judge was not the aberration he now appears to be. At one time most states banned interracial marriages and most authorities thought that a ban on interracial marriage was "not only correct but also an integral part of marriage law." Cott Decl. at ¶ 28. But times have changed, and so has our understanding of what is right.

Thirty years ago, the constitutionality of this state's ban on marriage between partners of the same sex was considered in *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974), and our Court of Appeals held that the ban did not do violence to the plaintiffs' civil rights. But times and attitudes towards lesbian and gay relationships have changed dramatically. When *Singer* was decided, gay and lesbian couples celebrated their commitments in private, as Beth Reis and Barbara Steele did in 1977, not in the very public way that Mala and Vega did in 2002. Back then, as the experience of Beth and Barbara and David Shull and Peter Ilgenfritz shows, it was not common for gay couples to adopt or openly raise children. Today, as the experience of Johanna Bender and Sherri Kokx, the Serkin-Pooles and Janet Helson and Betty Lundquist shows, it has become routine for couples of the same sex to have

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children, by birth and adoption, and raise and nurture these children openly and with the full approval of the State. Klawitter Decl. ¶ 22; Wechsler Decl. ¶ 2.

These changing times have brought dramatic changes to the law. In the last 11 years the highest courts of Massachusetts, Vermont, and Hawai'i, British Columbia, Ontario and Quebec have held that prohibitions against the marriage of same-sex couples constitute discriminatory treatment requiring compelling state justification.[12] Indeed, the highest court of every state and every Canadian province that has ruled on the question has held that a ban on marriage between same-sex partners was impermissible. *Id.*

Marriage is a creation of state law, which is why state cases are in the forefront of advancing the civil right to marry. The same was true when it came to overturning the anti-miscegenation laws. Nineteen years before *Loving v. Virginia* was decided, the California Supreme Court led the way by striking down that state's prohibition on interracial marriage. *Perez v. Sharp,* 32 Cal.2d 711, 198 P.2d 17 (1948). *Singer,* like the anti-miscegenation laws struck down in *Perez* and *Loving,* was a reflection of the attitudes of its time, but that time has passed. *Singer* is no longer good law, and surely will be overruled by the first appellate court that considers it. Because *Singer* is outdated, and because it did not measure the validity of the marriage prohibition by the enhanced standard of privileges and immunities review adopted after *Singer* was decided, it should be disregarded by this court.

As is often the case when important civil rights are at issue, Washington's marriage prohibition violates several sections of the Washington constitution: the privileges and immunities clause, Const. art. I, § 12; the equal rights amendment, Const. art. XXXI, § 1; and the due process clause, Const. art. I,

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[12] *Goodridge v. Department of Health,* 440 Mass. 309, 798 N.E.2d 941 (2003); *Baker v. Vermont,* 170 Vt. 194, 744 A.2d 864 (1999); *Baehr v. Lewin,* 852 P.2d 44 (Haw. 1993); *Halperin v. Toronto,* 172 OAC 276 (Ont. Ct. App. 2003); *Barbeau v. Attorney General of Canada,* 2003 BCCA 276 (B.C. Ct. App. 2003): *Hendricks v. Attorney General of Canada,* _____ (Quebec Ct. App. 2004).

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§ 3. Although this brief will, of necessity, discuss these constitutional violations one at a time, there is substantial overlap. *See Goodridge v. Department of Health*, 440 Mass. 309, 798 N.E.2d 941, 953 (2003) ("In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [equality and liberty/due process] frequently overlap, as they do here"). The privileges and immunities clause protects persons from being treated unequally and it requires heightened scrutiny when there is a reason to suspect that a classification is based on prejudice. The due process clause demands strict scrutiny when fundamental rights, like the right to marry, are restricted, and the Equal Rights Amendment strictly prohibits regulation based on one's sex. Each of these protections is violated by the marriage prohibition. That the marriage prohibition violates so many provisions of the Constitution underscores the "suspicion" with which the Court should view it. The fact that the government is using suspect classifications (gender and sexual orientation) to deprive a vulnerable minority group (gay people) of a fundamental right (the freedom to marry) -- sadly leaves no doubt that the true motive for the prohibition is raw prejudice, just as it was with the anti-miscegenation laws.

A. Denying Marriage Licenses To Same-Sex Couples Violates Plaintiffs' Rights Under Washington's Privileges And Immunities Clause.

Under the Washington Constitution, the State may not grant to anyone "privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." Const. art. I, §12. This clause has an independent and more protective meaning than the federal Equal Protection Clause, [13] as the Washington Supreme Court recently explicitly held. *Grant County Fire Protection District v.*

[13] To determine whether the privileges and immunities clause provides more protection than does the Equal Protection Clause of the United States Constitution, the Court considered the six-factor test it had developed in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). These factors are: (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) whether the matter is of particular state and local concern. *Gunwall*, 106 Wn.2d at 58.

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City of Moses Lake, 150 Wn. 2d. 791, 806, 83 P.3d 419 (2004); *see also Darrin v. Gould,* 85 Wn.2d 859, 868, 540 P.2d 882 (1975) (Const. art. I, § 12 may be construed to provide greater protection to individual rights than that provided by the Equal Protection Clause).

1. The Right to Marry Is a Protected "Privilege."

A "privilege" is one of "those fundamental rights which belong to the citizens of the state by reason of such citizenship . . ." *State v. Vance*, 29 Wash. 435, 458, 70 Pac. 34 (1902); *see also State ex rel. Cruickshank v Baker*, 2 Wn.2d 145, 150-151, 97 P.2d 638 (1940). "The right to marry is a fundamental constitutional right," *Levinson v. Horse Racing Comm'n*, 48 Wn. App. 822, 824, 740 P.2d 898 (1987), and thus unquestionably a "privilege" protected by the privilege and immunities clause. "[I]t is virtually beyond question that the opportunity to enter into a . . . marriage contract is a privilege or immunity." Oregon Attorney General letter to Gov. Kulongoski (03/12/04) (interpreting Oregon's almost identically worded privileges and immunities clause), Appendix A.

2. The Marriage Exclusion Is Subject to Strict Scrutiny.

No Washington opinion has analyzed whether a statute that deprives a discrete, vulnerable class of citizens of a fundamental right violates the independent and broader meaning of our state's privileges and immunities clause. Since Washington's clause was adopted from the Oregon Constitution, our courts "may look to" Oregon's well-developed body of case law analyzing its clause. *Grant County,* 83 P.3d at 426.[14]

[14] The recent authoritative treatise analyzing the state constitution emphasizes that "[s]ubstantial insight can . . . be gained from the constitutions that the delegates copied from or referred to in drafting Washington's Constitution. . . . The Washington Declaration of Rights, for example, was based largely on W. Lair Hill's proposed constitution and its model, the Oregon Constitution." Utter, Robert F. and Spitzer, Hugh D., *The Washington State Constitution* (2002).

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a. Suspect classification analysis applies in Washington for the same reasons it applies in Oregon.

To invoke the protection of Oregon's privileges and immunities clause, Oregon courts have held that plaintiffs must show that they are members of a "true" class of citizens, that the statute discriminates against the class on the basis of the characteristics of that class, and that the discrimination is not justifiable. *See State v. Clark*, 291 Or. 231, 240, 630 P.2d 810 (1981); *Jungen v. State*, 94 Or. App. 101, 105, 764 P.2d 938 (1988). A "true" class does not exist solely as a result of legislation, but must exist and be determined outside of the law. *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502, 971 P.2d 435, 445 (1998) (examples are gay people, women, persons of a particular ethnic background or national origin, children whose parents are not married to each other, and past or present residents of an area).

Although some class-based discrimination may be justified because there is an adequate "rational basis" to justify it, if the classification deserves "suspicion," the discrimination will be subject to a more demanding examination. *Id.* A "suspect" classification is one that employs irrelevant personal characteristics that have been "historically regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Id.* 971 P.2d at 446.

Sexual orientation is a suspect classification under Oregon privileges and immunities analysis because lesbians and gay men constitute a "distinct class" that has been and will continue to be "the subject of adverse stereotyping and abuse:"

> [W]e have no difficulty concluding that plaintiffs are members of a suspect class. Sexual orientation, like gender, race, alienage and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

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Tanner, 971 P.2d at 447; *see Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 45, 633 P.2d 970 (1982).[15]

Washington courts have not yet determined whether sexual orientation is a suspect classification. *See, e.g., Miguel v. Guess*, 112 Wn. App. 536, 552 n.3, 51 P.3d 89 (2002) (court did not reach heightened scrutiny issue because the employment discrimination based on sexual orientation could not pass the rational relationship test). When the question is squarely presented, however, Washington precedent will easily lead to the same conclusion as in Oregon. Washington, as Oregon, does not restrict its scrutiny of potentially suspect classifications to groups already recognized as such under federal law, but rather makes an independent determination based on factors such as whether "outdated social stereotypes" are being used to relegate a whole class to "an inferior legal status without regard to the capabilities or characteristics of its individual members." *See Hanson v. Hutt*, 83 Wn.2d 195, 199, 517 P.2d 599 (1974) (sex-based classifications based on outmoded stereotypes are inherently suspect and must be subject to strict judicial scrutiny) (quoting *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 18-20, 485 P.2d 529, 540 (1971)).

Similarly, gay men and lesbians form a distinct group,[16] defined solely by sexual orientation, a characteristic that bears no relation to the individual's "ability to perform or contribute to society." *Id.*

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[15] In *Tanner*, the court found an unconstitutional denial of equal privileges and immunities where the state was providing insurance benefits for the dependent family members of its married heterosexual employees , but not for the long-term domestic partners of its lesbian and gay employees. The benefits classification was facially neutral as to sexual orientation (married employees were eligible for dependent coverage, unmarried employees were not) and the State of Oregon argued that it was permitted to treat married and unmarried employees differently. But the *Tanner* court held "that reasoning misses the point... homosexual couples may not marry and thus the benefits are not available to them." *Id.*

[16] In considering whether sexual orientation shares the same type of immutable characteristics as other suspect classifications, it is clear that the weight of the scientific evidence does suggest that sexual orientation is established early in life and, once established, is largely not a matter of choice. See discussion and authorities cited in Editors of the Harvard Law Review, *Sexual Orientation and the Law*, 57-58 and nn. 93-94 (1989). *See also* L.D. Garnets and D.C. Kimmel, "Lesbian and Gay Male Dimensions in the Psychological Study of Human Diversity," in *Psychological Perspectives on Lesbian & Gay Male Experiences* 1-21 (2003) (overview of the research conducted over time concerning nature, causation and consistency of sexual identity).

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Lesbians and gay men in Washington, as in Oregon, are subject to adverse social and political stereotyping and prejudice. Employment discrimination based on sexual orientation continues to be a serious problem, *see, e.g. Miguel, supra,* 112 Wn. App. 536, but in most areas of the state, gay men and lesbians have no recourse against such discrimination.[17] As plaintiff Heather Andersen, whose car tires were slashed while she was doing an AIDS presentation, knows, gay people face disproportionate levels of violence and harassment, both nationally and in Washington State. The Department of Justice has estimated that gay people are the most frequent victims of hate violence in the country.[18] Justice Brennan was not exaggerating when he said that, "[o]utside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' and such 'immediate and severe opprobrium' as homosexuals." *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of *certiorari*). Given this context, the Washington courts should have no difficulty in concluding, as did the *Tanner* court in Oregon, that gay people constitute a "true"

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[17] Dozens of studies over the past twenty years have confirmed the widespread nature of employment discrimination against lesbians and gay men. *See, e.g.*, American Psychological Association, *Examining the Employment Nondiscrimination Act (ENDA): The Scientists Perspective* at p. 5 of 9, posted at http://www.apa.org/pi/lgbc/ publications/enda.html?CFID =2528744&CFTOKEN=6672615 (reporting that up to 44% of gay and lesbian workers had experienced discrimination at some point in their careers; and that gay and bisexual men earned 27% less than their heterosexual male counterparts); M.V. Lee Badgett, Ph.D., *Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination in the Workplace*, 2 Angles 1 (Sept. 1997), *available at* .http://www.iglss.org/media/files/angles_21.pdf. As one leading expert has phrased it: "Job discrimination continues to pose one of the gravest civil rights threats in the lives of lesbian and gay citizens." John C. Gonsiorek, *Threat, Stress, and Adjustment: Mental Health and the Workplace for Gay and Lesbian Individuals, in Homosexual Issues in the Workplace* 243, 244-45 (Louis Diamant ed., 1993). At present, gay people receive no federal-level protection against discrimination in employment, and Washington does not include sexual orientation in its Law Against Discrimination, RCW 49.60.030.

[18] National Institute of Justice, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review* 2 (1987). *See generally* Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 Am. Psychologist 948 (1989) (reporting that 92% of lesbians and gay men have been targets of anti-gay verbal abuse or threats and as many as 24% have been victims of physical attacks because of their sexual orientation). For Washington, *see* Linda Keene, "Hate Crimes On Rise In NW – Homosexuals, Racial Minorities Are Targets," The Seattle Times, p. B1, June 8, 1990. Even in the most tolerant areas, gay people can be vulnerable if identified. A 1984 survey of Seattle residents found that 21% of gay men and 12% of lesbians had been physically attacked due to their sexual orientation. Barbara Laker, "Attacks on Homosexuals Spur 'Hate-Crime' Conference," Seattle Post-Intelligencer, p. C7, Jan. 25, 1990. According to the most recent FBI study, "Hate Crimes Statistics 2002," a total of 37 anti-gay hate crimes were reported in Washington in 2002. *See* http://www.fbi.gov/ucr/hatecrime2002.pdf, at pp. 53-54.

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class and that government classifications that exclude or otherwise treat this group unfavorably are "suspect" and require a compelling and narrowly tailored justification to survive scrutiny.[19]

b. The "no gay couples allowed" marriage rule cannot survive strict scrutiny.

The distinction created by Washington's DOMA cannot survive such scrutiny. The state has no compelling justification for denying marriage licenses to same-sex couples who have the same range of emotional, financial and practical needs as different-sex couples. The denial to lesbian and gay couples of the fundamental right, and "privilege," of a civil marriage license is a class-based distinction that plainly fails to pass constitutional muster under the well-reasoned case law followed by the Oregon courts. The Oregon Attorney General has reached the same conclusion, acknowledging that it is likely that the Oregon Supreme Court will hold that Oregon's privileges and immunities clause is violated by his state's refusal to recognize the right of same-sex couples to marry. App. A at 11.[20]

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[19] Although this case is brought only under the Washington constitution, it should be noted that federal equal protection jurisprudence has continued to move towards a heightened level of scrutiny for sexual orientation classifications. Numerous respected commentators have long argued that such classifications should receive strict scrutiny. *See, e.g.,* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163-79 (1988). *See also Lawrence v. Texas,* __ U.S. ___, 123 S. Ct. 2472 (2003) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down laws under the Equal Protection Clause.") (O'Conner, J., concurring).

[20] And, indeed, having applied the law developed in *Tanner*, the Oregon trial court also concluded that the sex-based marriage rule, which categorically excludes the class of gay and lesbian couples, does violate the privileges and immunities guarantee. *Li v. State of Oregon*, Case No. 0403-03057 (April 20, 2004) (Bearden, J.). Other states have reached the same conclusion under similar state constitutional provisions. In Vermont, for example, the Supreme Court held that a ban on marriage between same-sex couples violated the Common Benefits Clause of the state constitution, which, similar to the privileges and immunities clauses of the Oregon and Washington constitutions, restricts the state's authority to discriminatorily bestow the benefits of citizenship. *Baker v. Vermont,* 170 Vt. 194, 744 A.2d 864 (1999). After *Baker* was decided, rather than curing the violation by removing the discriminatory restriction in the marriage law, the Vermont legislature enacted a statute creating a new legal status – civil unions – for same-sex couples. Whether the state's continued denial of marriage violates the Vermont Common Benefits Clause has not been addressed, since the *Baker* plaintiffs dismissed their case without asking the court to consider the constitutional adequacy of the civil union legislation.

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3. The Marriage Exclusion Cannot Even Survive Rational Basis Review.

Strict scrutiny should apply in this case, both because of the sexual orientation classification and because of the burden on the fundamental right to marry. But, even under the most minimum level of scrutiny, the rule excluding same-sex couples from marriage cannot be upheld unless it is serves a "legitimate state objective" to which it bears a "rational relationship." *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997). A discriminatory classification that is based on prejudice or bias is not rational as a matter of law. *Miguel v. Guess, supra,* 112 Wn. App. at 553.

In *Romer v. Evans*, the United States Supreme Court held that a government classification that amounted to unreasoned class-based discrimination against gay men and lesbians could not survive under the rational basis standard. *Romer,* 517 U.S. 620, 634 (1996) (If "'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest").[21] Washington's constitution is no more tolerant of invidious discrimination, even under the more lenient "rational basis" review.[22] The marriage exclusion here has no reasonable basis. It can only be understood as the product of discriminatory animus against gays and lesbians; the different sex restriction is not rationally related to any *legitimate* governmental purpose whatsoever.

One commonly stated rationale for restricting marriage to different-sex couples is that marriage is about procreation. For example, the *Singer* court declared that marriage is "clearly related to the

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[21] *See also Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997); *Nabozny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996); *Quinn v. Nassau Cty. Police Dept.*, 53 F.Supp.2d 347 (E.D.N.Y. 1999); *Tester v. City of New York,* 1997 U.S. Dist. LEXIS 1937 (1997), all confirming that classifications based on sexual orientation are subject to federal equal protection review, and finding the differential treatment unjustifiable in each case.

[22] Even under pre-*Grant County* law, Washington courts held that a statutory classification could satisfy the privileges and immunities clause only if there were "reasonable grounds" for the distinctions drawn. *See State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), *overruled on other grounds, Puget Sound Gillnetters Ass'n v. Moos,* 92 Wn.2d 939, 603 P.2d 819 (1979) (classification must rest on a "real and substantial difference bearing a natural, reasonable, and just relation to the subject matter of the act").

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public interest in affording a favorable environment for the growth of children." *Singer*, 11 Wn. App. at 264. However, marriage has never been legally limited to couples willing and able to conceive and raise children. *See* Cott Decl. at ¶ 9. To marry, couples need establish neither ability nor intent to procreate. Nor is procreation limited to married couples; unmarried couples are free to bear children if they wish to do so.[23]

If the state objective is not procreation, but "a favorable environment for the growth of children," the categorical exclusion of all same-sex couples actually undermines the state's goal. As demonstrated by the plaintiffs here, gay and lesbian couples in Washington have children and many of them do a remarkable job of raising them. *See, e.g.*, Cowling Decl.; Rock Decl. The state allows both joint adoptions, as with the Serkin-Poole family, and second-parent adoptions, as with the children born to Johanna Bender and Sherri Kokx. Washington also licenses same-sex couples, like Betty Lundquist and Janet Helson, to provide foster care, and the state entrusts its most vulnerable residents, its abused and disabled children, to same-sex couples like the Serkin-Pooles. These couples *have* children, and their best interests are compromised – they face legal risks every day – because Washington denies their parents the fundamental freedom to cement the family's ties with a civil marriage license. Moreover, these children must live with the same stigma of illegitimacy that courts decried three decades ago. In cases such as *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the courts determined that children should not be penalized for their parents' unwillingness to bind themselves in marriage. Today, children of gay couples carry that same social and

[23] "Marriage has, of course, customarily been associated with procreation and the continuation of kinship lines, but civil marriage in the United State has never been defined legally as procreative, nor required of the parties to the marriage contract the intent or ability to have children. While impotence – *i.e.* the inability to have sexual intercourse--was, historically, a reason for annulment of marriage, sterility was not; and inability to generate or bear a child has never been a grounds for annulment or divorce, nor a bar to marrying. Thus, for example, women past menopause have never been barred from marrying." Cott Decl. ¶ 9.

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legal burden because of the *State's* refusal to allow their parents to take responsibility for their children. There is nothing rational about a law that burdens children with the stigma of illegitimacy.

The fundamental illogic of the "favorable environment for children" rationale has been recognized in other states. *See, e.g. Goodridge v. Department of Health,* 798 N.E. 2d at 964 ("It cannot be rational to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation"). Here, as in Massachusetts, gay and lesbian couples have children "for the same reasons others do – to love them, to care for them, to nurture them." Id., at 963. How does the state advance its interest in children by making "the task of child rearing for same-sex couples . . . infinitely harder by their status as outliers to the marriage laws"? *Id.*

The other arguments usually advanced for excluding same-sex couples from marriage are so-called "traditional morality" and religion. Thirty years ago, the *Singer* court declared "[t]he institution of marriage as a union of man and woman ... is as old as the book of Genesis...." *Singer v. Hara,* 11 Wn. App. at 264. *Singer's* rationalization of Washington's same-sex prohibition because it was "deeply founded" in tradition and religion has been thoroughly discredited by modern precedent.[24] *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2483 (2003) ("the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for barring the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack"); *Goodridge,* 798 N.E.2d at 953.

The anti-miscegenation laws were often justified by references to religion similar to the reference made by *Singer*. *See, e.g., Scott v. Gibson,* 36 Ind. 389 (1871) (laws requiring separation of the races derive not from "prejudice nor caste, nor injustice of any kind, but simply to suffer men to

[24] A resort to "tradition" also raises the difficult question of whose tradition and from what time period. Mala's parents come from a tradition of arranged marriage, a tradition that most in the United States gladly have abandoned.

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follow the law of races established by the Creator himself") (*quoting Philadelphia & W. Chester R.R. Co. v. Miles*, 2 *Am. L. Rev.* 358 (Pa. Sup. Ct. 1867). *See also Perez v. Sharp*, 32 Cal. 2d 711, 714, 198 P.2d 17 (1948). As the Washington Attorney General has already acknowledged, religion is an improper ground upon which to justify the law prohibiting same-sex marriage. Gregoire, Christine, to Legislative Leadership (03/10/04) ("matters of religious or moral belief and conviction are outside the reach of government regulation") Appendix B. Supporting or encouraging doctrinal conceptions of marriage held by various conservative religions is not a permissible governmental purpose and cannot form any part of the justification for Washington's discriminatory marriage rules. Both the federal and state constitutions strictly prohibit the establishment of religion. U.S. Const. amend. I; Const. art. I, § 11.[25]

Nor is a resort to "tradition" an adequate reason to deny an entire class of people the benefits of civil marriage. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver Wendell Holmes, *The Path of Law*, 10 Harv.L.J. 457, 469. Just as we have witnessed the repudiation of racist traditions, we have seen laws that relegated women to the "traditional" role of second-class status rightly give way to more modern views. Few today would be heard to declare, as the United States Supreme Court did once that, "divine ordinance" and the "natural and proper timidity and delicacy which belongs to the female sex" restrict women to "the domestic sphere" or render them unfit "for many occupations of civil life," and make it "repugnant" to imagine a "woman adopting a distinct and independent career from her husband." *Bradwell v. Illinois*, 83 U.S. (16

[25] Plaintiffs do not ask this court to make any decision affecting the right of religions to marry or to refuse to marry whomever they chose. David Shull knows from painful personal experience that different religions will do as their differing doctrines demand, and neither he nor any other of the plaintiffs asked this court to interfere with religious doctrine. Plaintiffs merely ask the State to afford them the same right to civil marriage that is available to different-sex couples, regardless of religious belief. Those plaintiffs who have been married in religious ceremonies find it deeply offensive that the State marriage law appears to prefer the restrictive doctrine of certain conservative religious denominations over the more inclusive doctrine of other religions.

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Wall.) 130, 141 (1872) (Bradley, J. concurring in an opinion joined by two other Justices). Historic and outmoded ideas of "traditional" family structure excluding same-sex couples must similarly give way to modern reality that includes gay and lesbian couples and their families.

No legitimate governmental justification exists to support the exclusion of committed gay and lesbian couples from civil marriage. The contention that the state's interest in procreation and child rearing is furthered by preventing families headed by same-sex couples from sharing in the benefits and burdens of marriage is not rational. The contention that the prohibition is supported by "religious or moral belief and conviction" is not a "*legitimate*" reason for the discrimination; it is just a cover for a distinction born of "animosity toward the class of persons affected." *See* Gregoire letter quoted above and *see Romer*, 517 U.S. at 634.

4. The Validity Of the Marriage Statute Is a Constitutional Issue, Not a Definitional Issue.

Singer defended Washington's marriage law by stating that the "recognized definition" of marriage is a relationship entered into by "two persons who are members of the opposite sex." 11 Wn. App. at 255. By trying to define away the issue, *Singer* engaged in what one court called an "exercise in tortured and conclusory sophistry." *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) (noting the argument was "circular and unpersuasive"); a*ccord, Goodridge*, 798 N.E.2d at 961, n. 23 ("it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.").

The argument also makes no sense today for two additional reasons. First, the statute has changed since *Singer*, and in making the change the legislature plainly acknowledged that marriage can exist between same-sex couples. In 1998 the legislature amended RCW 26.04.010 to specifically withhold the right to marry from same-sex couples. Laws of 1998 ch. 1, § 3. By doing so, the Act implicitly recognized that marriage no longer had a "recognized definition" limited to different-sex

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pairings. The language of the 1998 Act shows that the legislature realized that "same-sex marriages" were not a definitional impossibility: "[This act establishes] public policy against same-sex marriage in statutory law that clearly and definitively declares same-sex marriages . . . etc." Laws of 1998 ch. 1, § 2.

A legislature does not enact a policy refusing to "recognize" something that does not exist. *See State v. Bash*, 130 Wn.2d 594, 602, 925 P.2d 978 (1996) ("statutes should be construed so that all of the language used is given effect, and no part is rendered meaningless or superfluous."). And, in fact, same-sex marriages do exist and are legally sanctioned in Canada, Belgium, the Netherlands, and, on May 17, in Massachusetts. Oregon, California, New Jersey, New Mexico, and New York soon may follow.

Second, today, unlike in *Singer*'s time, same-sex partners publicly commit their lives to each other, buy homes together, share expenses, raise children and grandchildren together, care for elderly parents together, and celebrate wedding rituals, including formal religious ceremonies. In other words, they do everything that couples married by the state do. To say that civil marriage cannot – by "definition" – exist between same-sex partners is to deny a 21st century reality.

B. Denying Marriage Licenses To Same Sex Couples Violates Plaintiffs' Right To Be Free Of Sex Discrimination.

Washington's Equal Rights Amendment (ERA) provides that "equality of rights and responsibilities under the law shall not be denied or abridged on account of sex." Const. art. XXXI, § 1. The ERA prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional equal protection analysis. *Guard v. Jackson,* 132 Wn.2d 660, 940 P.2d 642 (1997). It mandates equality in the strongest of terms and "absolutely prohibits the sacrifice of equality for *any* state interest, no matter how compelling . . . ." *Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County,* 100 Wn.2d 109, 127, 667 P.2d 1092 (1983).

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Washington's marriage statute provides that "[m]arriage is a civil contract between a male and a female. . . ." RCW 26.04.010(1). The statute plainly restricts the right to marry based on the sex of an individual's chosen partner. As one court put it: " if twins, one male and one female, both wished to marry a woman . . . only gender prevents the twin sister from marrying under present law." *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998). This is a sex-based classification that violates the ERA. *Cf. Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney J., concurring); *Baehr v. Lewin*, 852 P.2d 44, 58 n.17, 60-61 (Haw. 1993).

The same logic led the United States Supreme Court to strike down laws restricting the right to marry on the basis of race. *Loving v. Virginia*, 388 U.S. 1 (1967).[26] Though Virginia argued that its law treated the races equally because the law burdened both blacks and whites, the Court disagreed. Rather, because the right to marry was based on "distinctions drawn according to race," it was unconstitutional. 388 U.S. at 11.[27] Likewise, the marriage prohibition is unconstitutional because it limits the right to marry based on distinctions drawn according to sex. The right to marry is of little use if one cannot marry that special one person who "may be irreplaceable." *Perez v. Sharp,* 198 P.2d at 25.

Singer was decided shortly after the Constitution was amended to add the ERA. Since then, Washington equal rights law has evolved and it is now clear that the ERA permits sex discrimination only if the classification is based on actual differences between the sexes, rather than stereotypical

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[26] To the extent the Washington ERA analysis is similar to a federal equal protection analysis applying strict scrutiny, *Loving* is considered highly persuasive. *Bowman v. Waldt*, 9 Wn. App. 562, 570, 513 P.2d 559 (1973).

[27] See *also Perez v. Sharp, supra* (in the quintessential area of state responsibility, family law, giving plaintiffs' discrimination claim appropriately serious consideration, notwithstanding that public support had not yet evolved, 19 years prior to *Loving*); *Baehr*, 852 P.2d at 67-68 (applying *Loving's* analysis to sex); *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring) ("That the classification is sex based is self evident."); *Baker*, 170 Vt. at 253, 744 A.2d at 864 (Johnson, J., concurring in part and dissenting in part).

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assumptions about the sexes.[28] *City of Seattle v. Buchanan*, 90 Wn.2d 584, 591, 584 P.2d 918 (1978) (ordinance requiring women, but not men, to cover their breasts in public did not violate the ERA because it was based on the physical differences between men and women). *Cf. Darrin v. Gould, supra* (barring girls from interscholastic high school football solely on the basis of their sex violated the ERA). "Laws that treat males and females differently are permissible only if they are 'based upon the unique physical characteristics of a particular sex.'" *Guard v. Jackson*, 83 Wn. App. at 332.

The only physical characteristic that distinguishes same-sex couples from different-sex couples is that some different-sex couples are able to conceive a child on their own, while same-sex couples must adopt, as the Serkin-Pooles did, or employ donor insemination, as Johanna Bender and Sherri Kokx did, or act as foster parents as Janet Helson and Betty Lundquist did. But this difference is plainly not material. The only factor of significance is one of sameness – couples composed of lesbians or of gay men, like all couples, can bring children into their families and can raise them as their own. There are no physical differences that alter this simple fact, and there is no physical distinction that justifies the state when it seeks to prevent some from marrying because their sex is the same as the sex of their loved one.

C. Denying Marriage Licenses To Same-Sex Couples Violates Plaintiffs' Right To Liberty and Privacy.

1. The Right to Marry Is a Fundamental Liberty Interest That May Be Denied Only for the Most Compelling Reasons.

Article I § 3 of the Washington Constitution guarantees that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Washington's law prohibiting marriage "[w]hen

[28] It is also now recognized that sexual orientation discrimination is in part based on sex stereotyping about acceptable gender roles. *See, e.g.,* Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination," 69 NYU L. Rev. 197 (1994); Marc Fajer, "Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men," 46 U. Miami L. Rev. 511 (1992).

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the parties are other than a male and a female," RCW 26.04.020(1)(c), is an unconstitutional denial of the right to liberty that is protected by Washington's due process clause.[29]

"The right to marry is a fundamental constitutional right." *Levinson supra*, 48 Wn. App. at 824. In *Levinson,* the court struck down a regulation that prohibited a horse owner from obtaining a racing license if her spouse had been convicted of selling a controlled substance because the prohibition impermissibly interfered with the right to marry. The indirect interference at issue in *Levinson* is minor indeed when compared to the hundreds of benefits that the State's marriage prohibition costs plaintiffs here. All Lynne Levinson needed to do to continue in her marriage was give up racing her horse. There is nothing any of these plaintiffs can do legally to marry their intended partners, nothing that is short of bringing and winning this lawsuit.

Like Washington, other states recognize that the freedom to marry is a core element of the individual liberty protected by due process. *See,* e.g., *Goodridge v. Dept of Public Health*, 798 N.E.2d at 957 ("Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family – these are among the most basic of every individual's liberty and due process rights."). Washington's rule likewise is consistent with longstanding federal doctrine. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (Marriage is one of the "basic civil rights of man.").[30]

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[29] The due process clause and the privacy clause, Const. art., I, § 7, are sometimes said to join in giving persons a right to intimate association. *See City of Bremerton v. Widell*, 146 Wn.2d 561, 575-77, 51 P.3d 733, *cert. denied*, 507 U.S. 1007(2002). To the extent this right is founded on both clauses, plaintiffs rely upon both.

[30] Because the due process clause of the Washington Constitution is identical to that set out in the Fourteenth Amendment to the U. S. Constitution, cases interpreting the Fourteenth Amendment have been given "great weight" by our courts when construing Washington's due process clause, and most Washington decisions do not distinguish between federal and state due process doctrine. *Petstel v. King County*, 77 Wn. 2d 144, 153-54, 459 P.2d 937 (1969), *citing Herr v. Schwager*, 145 Wash. 101, 105, 258 P. 1039 (1927). Accordingly, these cases show how Washington's marriage restrictions violate the Washington due process clause.

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State and federal courts alike have been consistent that abrogation of the fundamental right to marry works a profound injury to the individual, and laws doing so require a compelling justification. In the recent, apt words of the Massachusetts high court:

> Without the right to marry -- or more properly, the right to choose to marry -- one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed commitment to an intimate and lasting human relationship." Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion.

Goodridge at 326, 798 N.E.2d at 957 (citations omitted).

By upholding the freedom of the individual to marry in contexts in which the government had advanced seemingly legitimate, nondiscriminatory interests, the United States Supreme Court has reinforced again and again how truly compelling a governmental purpose would have to be to justify abridgement of this freedom. For example, *Zablocki v. Redhail*, 434 U.S. 374 (1978) held that the state of Wisconsin could not restrict the right to marry of a father whose failure to support his first child had left the child a ward of the state. In so holding, the Court emphasized the central importance of marriage in our lives:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Zablocki, 434 U.S. at 384 (*quoting Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). Notwithstanding that Mr. Zablocki might well have more children who also might become public charges, the Court held that Wisconsin could not restrain his right to remarry and start a new family because his right to do so was of "fundamental importance." *Id.* at 383.

In contrast to Mr. Zablocki, plaintiffs Janet Helson and Beth Lundquist were licensed by the state to raise foster children, yet now cannot give their son Tyler and daughter Zora the emotional and

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financial benefits of being raised by parents who are married. The same is true for the Serkin-Pooles, who have adopted three abused children with severe needs and raised them to productive adulthood; their "coming together for better or for worse," has been "enduring" and devoted to "a way of life" with "noble purposes." All of these adults possess the same fundamental liberty interest, and *Zablocki* demonstrates the extraordinary weight of the State's burden to justify its violation of these plaintiffs' inherent freedom.

Similarly, in *Turner v. Safley*, 482 U.S. 78 (1987), the Court struck down a Missouri law prohibiting inmates from exercising their freedom to marry. The Court confirmed that this aspect of liberty is so central that individuals retain it even after having forfeited most other significant liberty interests, including the almost complete lack of privacy necessitated by prison life.

The emotional support, public commitment and many other benefits afforded by marriage are no less important to each of the plaintiffs than they were to Mr. Turner and his fellow inmates. Marriage does not have less spiritual significance to pastors David Shull and Peter Ilgenfritz than for the *Turner* inmates. The unavailability of social security benefits to one's unmarried life partner is as important to Beth Reis and Barbara Steele as they face retirement, if not more important, than it is for the generally much younger inmate population. For Boo Torres de Esguerra, being unable to protect her "other half" with health insurance that would be freely provided by her union if she could exercise her freedom to marry is certainly no less significant than are similar deprivations of "benefits and property rights" to inmates, whose needs, including health care, are paid for by the state. The fact that inmates who have lost their freedom of movement, and their privacy nonetheless retain the freedom to marry because it is "fundamental," only underscores the magnitude of the constitutional injury to these plaintiffs.

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Last summer, the United States Supreme Court held in no uncertain terms that gay and lesbian Americans indeed do possess the same constitutionally protected freedom as heterosexual Americans in matters of the heart and family life:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 2481 (2003), (*quoting Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

Six months later, in applying these principles to the right of same-sex couples to marry, the Massachusetts Supreme Judicial Court stated: "The liberty interest in choosing whether and whom to marry would be hollow if the [state] could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage." *Goodridge*, 798 N.E.2d at 959. The same must be true here in Washington.

2. The Right to Intimate Association Is a Fundamental Right That May Be Denied Only for the Most Compelling Reasons.

In *City of Bremerton v. Widell*, 146 Wn.2d 561, 577, 51 P.3d 733 (2002) the Court recognized a right of intimate association under the due process clause that included the right to enter into marriage – the most intimate of associations. Although the *Bremerton* Court held that a housing authority's anti-trespassing policy, which prevented non-residents from visiting their fiancées' apartments located within the housing authority, was not a constitutional violation, the holding was based on the fact that the couples were engaged rather than married. *Id.*, 146 Wn.2d at 577-78. The anti-trespassing policy at issue did not hinder plaintiffs' "ability to marry the person of their choosing." *Id.* at 580.

In recognizing the right of intimate association, the court relied upon *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) where the U.S. Supreme Court defined the right of intimate association as

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protecting "the choices to enter into and maintain certain intimate human relationships . . ." 146 Wn.2d at 576. Justice Brennan explained the reasoning behind protecting the right to intimate association in *Roberts:*

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Roberts, 468 U.S. at 619.

By preventing the plaintiff couples from entering into marriage with each other, based solely on one of them being the "wrong" sex, the state is impermissibly infringing on one of the most protected of relationships – marriage. While serving no legitimate purpose whatsoever, Washington's discriminatory marriage law "hinders [each plaintiff's] ability to marry the person of [his or hers] choosing," and thus is a "direct and substantial" burden on the right to associate intimately.

3. The Marriage Prohibition Is Neither Supported by Compelling Reasons Nor Is it Narrowly Tailored.

"When a statutory classification significantly interferes with the exercise of [the right to marry], it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Levinson, supra,* 48 Wn. App. at 825 (*quoting Zablocki,* 434 U.S. 388); *see O'Hartigan v. The Department of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991) (where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.) No compelling interest is advanced by the prohibition.

As is set forth above, no legitimate state interest supports the marriage prohibition. It is also unceasingly broad. No same-sex couples, regardless of their situation, are qualified to marry. The

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prohibition plainly violates the Washington due process clause and the plaintiffs' right to intimate association.

4. *Singer*'s Due Process Holding Is No Longer Good Law.

Singer's holding that Washington's heterosexual-only marriage law did not violate the due process clause was based on the perceptions and the prejudices of 30 years ago. Times have changed dramatically, and because of those changes *Singer* is no longer good law.

a. Our constitutional liberties are not frozen in past misconceptions.

In *Lawrence v. Texas*, the Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that the Texas prohibition on sodomy between same-sex partners violates the Due Process Clause. In *Bowers*, a gay man who had been arrested in his own bedroom for engaging in consensual sex with an adult male partner contended that Georgia's sodomy prohibition was unconstitutional. The *Bowers* Court narrowly framed the issue before it as being about the "fundamental right to engage in homosexual sodomy." 478 U.S. at 191. To ask the question in that way was to answer it as well, so the Court rejected as "facetious" the claim that "homosexual conduct" is entitled to the same constitutional protection as "heterosexual conduct." *Id.* at 194. Back in 1986, the Court could not see past Michael Hardwick's sexual orientation to appreciate the fundamental right we all have to form intimate adult relationships and to conduct our private lives in our own homes as we wish.

In the seventeen years since *Bowers* was decided attitudes about gay people changed dramatically. In *Lawrence,* the Court observed that in *Bowers* it had failed "to appreciate the extent of the liberty at stake" when it decided *Bowers*. *Lawrence,* 123 S. Ct. at 2478. *Lawrence* held the Due Process Clause protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.*, 123 S. Ct. at 2481-82. The Court

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declared that gay people, just like everyone else, "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny . . ." 123 S. Ct. at 2484.

The Court rejected the notion that the scope of our constitutional rights and liberties is frozen in time:

> Had those who drew and ratified the Due Process Clauses . . . known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id., 123 S. Ct. at 2484 (emphasis supplied). Our constitution is a living document.

b. *Singer* is based on false premises.

The Courts of Appeals in Washington now recognize that same-sex couples form stable, long-term relationships that are entitled to protection under the law using the same legal principles applied to other couples. Several months ago in *Gormley v. Robertson,* 120 Wn. App. 31, 83 P.3d 1042 (2004) Division III held that the meretricious relationship doctrine was available to equitably distribute assets on the breakup of a same-sex couple. *Gormley* followed the mandate of the Washington Supreme Court in *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001), that "[e]quitable claims are not dependent on the 'legality' of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties." *Id.* at 107. In *Heinsma v. Vancouver,* 144 Wn.2d 556, 29 P.3d 709 (2001) the Supreme Court affirmed a city's authority to provide family health insurance coverage and other partner benefits to its workers who had domestic partners rather than spouses, noting the city's legitimate need to treat all employees fairly. And in *Carvin v. Britain*, decided as this brief was being written, the Court of Appeals observed "the evolving nature of families in Washington," and held that a non-biological lesbian mother was a de facto parent with standing to seek shared parentage or visitation

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with the child she and her former partner had planned for and raised together for years. *Id.*, 2004 WL 938361 (Ct of App, Div. I. May 3, 2004),

These cases all illustrate the increased visibility of same-sex couples, and the fact that they are calling on their government to provide equitable treatment in circumstances – such as the need for health insurance and for court assistance upon dissolution of the relationship – in which different-sex and same-sex couples face the same challenges.

Gormley, Vasquez, Heinsma and *Carvin* illustrate the transformation in attitudes that inspired the U.S. Supreme Court to overrule *Bowers v. Hardwick*. Gay and lesbian couples have "come out of the closet" since *Singer* was decided to take their place publicly in society just as heterosexual couples always have done. This reality has washed away the foundation on which *Singer* was built.

Our Constitution demands a "frequent recurrence to fundamental principles" because a continual redefinition of those principles "is essential to the security of individual right and the perpetuity of free government." Const. art. I, § 32. When it comes to matters of constitutional import, no court may adhere to precedent that has outlived the reasons for its creation without running afoul of Article I § 32, or the command of *Lawrence* to look to today's reality to find meaning in the words of the Constitution.

This court can and should disregard *Singer* and hold that Washington's denial of marriage licenses to single-sex couples offends the due process clause of Washington's Constitution. It is a bedrock maxim that precedent is not binding if "it can be shown that the law was misunderstood or misapplied in that particular case." Kent's Commentaries 475 (12th ed. 1896). Or, as another commentator put it, "[w]here stops the reason, there stops the rule." Karl Llewellyn, The Bramble Bush 158 (7th printing 1981). It is proper for trial courts to decline to follow existing precedent when the trial court becomes firmly convinced that the controlling court will reverse the precedent when it has the opportunity to do so. *Barnette v. West Virginia Bd. of Ed.*, 47 F. Supp. 251, 252-53 (S.D.W. Va. 1942),

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aff'd, 319 U.S. 624 (1943). At a politically charged moment in United States history, the *Barnette* court held, contrary to unambiguous Supreme Court precedent, that it was unconstitutional to force school children to salute the flag if it was contrary to their constitutional beliefs. The lower court concluded both that times had changed enough that the appellate court would decide the issue differently when next faced with it, and that following the old precedent would infringe fundamental rights. *Id.* (Citation omitted.); *see also Harris v. Younger*, 281 F. Supp. 507 (C.D. Cal. 1968), *rev'd*, 104 U.S. 37 (1971) (not following Supreme Court precedent due to the court's determination that the Court would overrule its precedent when given the chance.).

The test for overturning an established rule is a clear showing that the rule is incorrect and harmful. *Key Design Inc., v. Moser*, 138 Wn.2d 875, 882, 983 P.2d 653 (1999). "[S]tare decisis does not force us into either an illogical or unrealistic straightjacket which requires us to accept [an] unanalytical and unreasoned conclusion . . ." *Jepson v. Department of Labor & Industries*, 89 Wn.2d 394, 407, 573 P.2d 10 (1997). Following *Singer* indeed would place this court in an "an illogical or unrealistic straightjacket." This court should reject *Singer's* "unreasoned" conclusion and hold that Washington's limitation of marriage to different-sex couples only abridges plaintiffs' civil rights.

D. Half Measures Will Not Do, Plaintiffs Are Entitled To Marry.

When Chief Justice Warren said that marriage "is fundamental to our very existence and survival" he was not talking about joint tax filings and community property. *See Loving v. Virginia,* 388 U.S. at 12. When Justice O'Conner said that marriage is "intimate to the degree of being sacred" she, too, was extolling the higher purposes served by marriage. *See Zablocki,* 434 U.S. at 384. As the Massachusetts Supreme Judicial Court recognized when considering whether a bill providing for civil unions was constitutional, providing anything less than marriage to same-sex couples is telling them they are second-class citizens:

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> The bill's absolute prohibition of the use of the word "marriage" by spouses who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual-couples to second-class status.

Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565, 570 (2004).

The plaintiffs now before this Court understand this point all too well. Based on his own life experiences, David Shull explained that no "matter how strong we try to be, no matter how well-adjusted we are, anything that makes one feel or experience being second-class and not co-equal damages our psychological well-being and hurts the society as well." Shull Decl. at ¶ 17. A civil union will not inspire Boo's niece to call Michelle "Auntie," and it will not stop Vega's mother from frequently and painfully reminding her that the State does not approve of her relationship with Mala. Nor will a civil union help Zachary, Quin, Tyler and Zora fight off the prejudice they are likely to encounter as they grow. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984) (holding that a White mother who married an African American man could not be deprived of the custody of her child on the basis that the child would be a victim of racial prejudice if she remained with her mother).

Second-class status perpetuates discrimination. In *Lawrence* the Court overturned the Texas sodomy law, even though it was almost never used to prosecute consenting adults for private sexual intimacy, because it was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence,* 123 S. Ct. at 2482. Bigoted attacks on persons perceived to be lesbians, like the assault on the car driven by Heather Andersen, will not automatically stop with marriage equality for same-sex couples. But offering Heather just a civil union instead of a marriage will reinforce the stigma of second-class status, and add coal to the fires of prejudice and bigotry.

In 1896, the Supreme Court upheld a Louisiana law that required railroads to provide "separate but equal" accommodations for the "white and colored races." *Plessy v. Ferguson,* 163 U.S. 537 (1896).

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It is evident from the Court's rejection of it that Mr. Plessy's argument was quite similar to the one made here: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority." 163 U.S. at 551. As we all know, generations of African Americans had to ride separate buses and trains, drink out of separate water fountains, and go to separate schools before the Supreme Court finally reversed itself fifty years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954). No matter whether it applies to schools or to civil unions "[t]he history of our nation has demonstrated that separate is seldom, if ever, equal." *Opinions of the Justices to the Senate*, *supra*, 802 N.E.2d at 569 (holding that proposed legislation establishing civil unions, but denying marriage rights, would offend the Massachusetts Constitution).

Justice John Harlan was the sole dissenter in *Plessy v. Ferguson*. He was brave enough to say that giving African Americans a right that was different, even if it was ostensibly equal, was "a badge of servitude:" "The arbitrary separation of citizens, on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds." *Id.* at 562. Likewise, withholding the right to marry from plaintiffs is a badge of inferiority.

VII. CONCLUSION

For hundreds of years, slave couples were prohibited from marrying and had to "jump the broom" to show their love and commitment, just as Beth Reis and Barbara Steele did in 1997. The emancipation proclamation and the victory of the Union Army in 1865 finally secured the right to marry for most African Americans. Forty-five years ago, two Americans fell in love across the color line, and were sentenced to jail for marrying. In 1967 Chief Justice Earl Warren writing for a unanimous court

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declared that the anti-miscegenation laws were offensive and the ban on interracial marriage finally ended.

Thirty years ago, our Court of Appeals denied two men the right to marry each other. Since then, gay men and lesbians have come out of the closet and taken their rightful places in our society as responsible workers, contributing taxpayers, devoted couples and loving parents. The time has come to recognize that each of them is entitled to exercise the fundamental right to marry "that person" who is "irreplaceable." *Perez*, 198 P.2d at 25. This court should hold that Washington law restricting marriage based on sex abridges the civil rights that are guaranteed to lesbians and gay men by the Washington Constitution.

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