

NO. 75934-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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HEATHER ANDERSEN and LESLIE CHRISTIAN, et al.,

Respondents,

v.

KING COUNTY, et al.,

Appellants,

v.

STATE OF WASHINGTON,

Appellant,

And

SENATOR VAL STEVENS, et al.,

Appellants (Intervenors).

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BRIEF OF AMICUS CURIAE  
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## **IDENTITY AND INTEREST OF AMICUS**

Families Northwest is a non-profit, non-partisan organization working to enhance family health and turn the tide on family breakdown so that more children are raised in nurturing homes by their married mother and father. As part of this mission, Families Northwest seeks to be a positive voice for safe, healthy, and lasting marriages, communicating its message to the media, government and other public institutions.

Families Northwest believes that the union of a man and woman in marriage establishes a unique human community in which children are naturally conceived and raised. As part of its mission, Families Northwest is working to preserve marriage between one man and one woman. In this brief, Families Northwest seeks to present the Court with some of the evidence regarding the unique societal importance of marriage, particularly to children. Every human life begins in a vulnerable and dependent state of childhood, and society's best hope to meet their full array of needs is to encourage and facilitate the health of marriages and recovery of that normative family partnership for bringing children into the world and up into responsible adulthood.

## **STATEMENT OF THE CASE**

Amicus adopts the Intervenors' Statement of the Case.

## SUMMARY OF ARGUMENT

Marriage – the publicly sanctioned union of a man and a woman – is a universal social institution, appearing in some form in virtually every known human society. Unlike purely private relationships, marriage is a public union, recognized and regulated by law.

Marriage is recognized in law because of the biological reality that sex between men and women often produces children, and because of the twin social realities that societies need to reproduce themselves and children need mothers and fathers. The marriage of a man and a woman is the only relationship which unites children with their own, biological mother and a father, in one family and household. No other relationship fulfills the same public purposes or provides the same justification for public recognition and regulation. Plaintiffs' argument for redefining marriage as a unisex relation divorces marriage from these important social functions, undermining the legal justification for the regulation of marriage and leading towards the abolition of marriage as a legal status.

## ARGUMENT

### **I. MARRIAGE IS DISTINCT FROM OTHER PERSONAL RELATIONSHIPS, UNIQUELY CONTRIBUTING TO THE WELL-BEING OF CHILDREN AND OF SOCIETY**

Adults have many kinds of close personal relationships that are highly valued and respected. Among these varied and diverse

relationships, marriage is the one relationship that gives rise to extensive state involvement. Why does government burden marriage with regulations as well as surround it with benefits? Why does Justice Sandra Day O'Connor describe "preserving the traditional institution of marriage" itself as a "legitimate state interest"? *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring). The answer to this question is important not only to the validity of RCW 26.04.010 and .020, but to the continued vitality of any marriage law or regulation.

As stated recently by the Indiana Court of Appeals:

The key question in our view is whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation. If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable . . . .

*Morrison v. Sadler*, Case No. 490A2-0305-CV-447, 2005 Ind. App. Lexis 75 at \*17 (January 20, 2005).<sup>1</sup>

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<sup>1</sup> As Intervenors and Defendants have argued, RCW 26.04.010 and .020 do not impinge upon any fundamental right or suspect classification. Thus, the statutes are entitled to a strong presumption of constitutionality and Plaintiffs bear a heavy burden in proving beyond reasonable doubt that the statutes have no rational connection to any legitimate governmental purpose. *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004) ("The standard of review in a case that does not employ suspect classification or fundamental right is rational basis, also called minimal scrutiny. Under the rational basis test, the court considers (1) whether the legislation applies alike to all members of the designated class, (2) whether there are reasonable grounds to distinguish between those within and without the class, and (3) whether the classification has a rational relationship

**A. Marriage Uniquely Furthers the Legislature's Interest in Promoting Child Well-being.**

Marriage is intimately involved with how committed we as a society are to two key ideas: that children need mothers and fathers and that marriage is the main way that we create stable, loving mother-father families for children. To date, we know very little about the outcomes of children raised in unisex households, justifying (if not strongly urging) caution before legally equating those households with married, mother-father families.

***1. The social science consensus recognizes that married mothers and fathers are most likely to provide the optimal environment for child well-being.***

Forty years of social experimentation has led to a broad consensus across ideological lines that family structure matters for child well-being. All things being equal, children do better when their own mothers and fathers get and stay married. Not just any two adults can provide these same benefits. Both adults and children are better off living in communities where more children are raised by their own married mother

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to the purpose of the legislation.”)(citations omitted). The plaintiff bears the burden of proof and “must show conclusively that the classification is contrary to the legislation’s purposes.” *Id.* 151 Wn.2d at 392 (quoting *Yakima County Sheriff's Ass'n v. Bd. Of Comm'rs*, 92 Wn.2d 831, 836, 601 P.2d 936 (1979)). As this Court has also stated, “[A] statutory classification will be upheld if any conceivable state of facts reasonably justifies the classification.’ The party challenging the legislation has the burden of proving that the classification is ‘purely arbitrary.’” *Tunstall v. Bergeson*, 141 Wn.2d 201, 226-227, 5 P.3d 691 (2000) (internal citations omitted).

and father.<sup>2</sup>

Recent reports from several mainstream child welfare and research organizations illustrate this consensus. A *Child Trends* research brief sums up the scholarly consensus:

Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two-biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.<sup>3</sup>

A Center for Law and Social Policy (CLASP) Brief finds:

Research indicates that, on average, children who grow up in families with both their biological parents in a low-conflict

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<sup>2</sup> Both adults and children live longer, have higher rates of physical health and lower rates of mental illness, experience poverty, crime, and domestic abuse less often, and have warmer relationships, on average, when their mothers and fathers get and stay married. See, e.g., Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L.Rev. 773 (2002) (describing numerous studies finding marriage and family structure important contributors to child well-being); William J. Doherty, et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* 8-9 (New York, Institute for American Values 2002); Trude Bennett & Paula Braveman, *Maternal Marital Status as a Risk Factor for Infant Mortality*, 26 Fam. Plan. Persp. 252 (1994); George Thomas & Michael P. Farrell, *The Effects of Single-Mother Families and Nonresident Fathers on Delinquency and Substance Abuse in Black and White Adolescents*, 58 J. Marriage & Fam. 884 (1996); Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health*, 29 J. Health & Soc. Behav. 38 (1988).

<sup>3</sup> Kristin Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?* Child Trends Research Brief, June 2002, at 1. This research brief on family structure does not compare outcomes for children raised by same-sex couples to children in other types of families. See also Robert I. Lerman, *Impacts of Marital Status and Parental Presence on the Material Hardship of Families with Children* (Washington, D.C., Urban Institute) (July 2002) at 27.

marriage are better off in a number of ways than children who grow up in single-, step-, or cohabiting-parent households.<sup>4</sup>

With a broad research consensus showing that children are best served when raised in a family “with both their biological parents in a low-conflict marriage,” it is reasonable for the Legislature to recognize and promote unions which can provide this environment for a child.

***2. Very little is known regarding the outcomes of children raised in unisex households, justifying legislative caution***

Despite frequent claims that children raised by two parents of the same sex do as well as children raised by a mother and father, social scientists have begun to note significant limitations in the body of research supporting such claims. Perhaps the most thorough critique was prepared by Steven Nock, a sociologist at the University of Virginia who was asked to review several hundred studies as an expert for the Attorney General of Canada. After reviewing the studies, Professor Nock concluded:

Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research.

Nock Aff. ¶ 3, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. of Justice).

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<sup>4</sup> Mary Parke, *Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being*, CLASP Pol’y Br. No. 3 (May 2003) at 6; see also Matthew D. Bramlett & William D. Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States*, CDC Advance Data No. 323 (May 31, 2001).

Prominent Berkeley sociologist Diana Baumrind expressed similar concerns, finding numerous methodological flaws including: the use of small, self-selected convenience samples, reliance on self-report instruments, and biased study populations consisting of disproportionately privileged, educated, and well-off parents. Due to these flaws, Baumrind questioned the research conclusions on both “theoretical and empirical grounds.” Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31(1) *Developmental Psychology* 130, 133-34 (1995).<sup>5</sup>

Even scholars enthusiastic about same-sex parenting concede that “there are no studies of child development based on random, representative samples of [same-sex couple] families.” Judith Stacey and Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *Am. Soc. Rev.* 159, 166 (2001). Charlotte Patterson, perhaps the most prominent researcher on gay and lesbian parenting, acknowledges that “most studies have compared children in divorced lesbian mother-headed families with children in divorced heterosexual mother-headed families,” providing no basis of comparison between children raised by their own mother and father and children raised by two parents of the same sex.

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<sup>5</sup> Another review, prepared by Robert Lerner and Althea Nagai in 2001, looked at forty-nine separate parenting studies before concluding that “the methods used in these studies are so flawed that the studies prove nothing.” Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* 6 (2001).

Charlotte J. Patterson et al., “Children of Lesbian and Gay Parents: Research, Law and Policy,” in *Children and the Law: Social Science and Policy* 10-11 (Bette L. Bottoms et al., eds. 2000).

As pointed out by three of the seven members of the Massachusetts Supreme Judicial Court, the paucity of reliable research on the outcomes of children raised by two men or by two women is itself sufficient to justify legislative restraint in recognizing such relationships as marriages:

[T]he attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. . . . Gay and lesbian couples living together openly, and official recognition of them as their children’s sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. . . . Our belief that children raised by same-sex couples *should* fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.

*Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941, 979-80 (Sosman, J., dissenting).

**B. Marriage Furthers the Legislature’s Interest in Minimizing the Risks of Out-of-wedlock Births, Thereby Protecting Children of Unanticipated Pregnancies**

Among the most vulnerable children in any society are children born out-of-wedlock, often unintended and sometimes unwanted by their

mother or (more often) father. Nowhere is the Legislature's interest in marriage more salient than in the protection of these children.<sup>6</sup>

Even with the widespread availability and use of contraceptives over the past forty years, the Washington State Department of Social and Health Services finds that 52.8% of all pregnancies in the state between 1999 and 2001 were unintended. Amy Ritualo, Laurie Cawthon & Peter Woodcox, *County Profiles, Birth and Unintended Pregnancy Statistics*, Washington State Department of Social and Health Services (April 2004). Other studies confirm this finding, and suggest that unintended pregnancies are particularly common among unmarried women.<sup>7</sup>

Whatever the theoretical impact of contraception, heterosexual sex continues to produce children, with significant impact for the government. Since the Supreme Court established a constitutional right to contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), unwed births have increased dramatically, rising from about 5 percent of all births in

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<sup>6</sup> Plaintiffs note that "the right to procreate does not depend on marital status," Resp. Castle Br. 35, arguing that this makes marriage entirely irrelevant to procreation and child rearing. To the contrary, the reality of out-of-wedlock pregnancies heightens the importance of government policies which encourage men and women in sexual relationships to undertake the legal responsibilities of marriage, providing their children the best opportunity to thrive.

<sup>7</sup> According to data from the National Center for Health Statistics, more than half (56%) of all births to unmarried women were unintended, while just 19% of births to married women were unintended. J. Abma, et al., *Fertility, family planning, and women's health: New data from the 1995 National Survey of Family Growth*, National Center for Health Statistics. Vital Health Stat 23(19) at 25 (table 14) (1997).

1960 to 33 percent of births today.<sup>8</sup> Thus, as an empirical matter, the availability of contraceptives has not reduced the State's interest in encouraging men and women (attracted to the opposite sex) to enter marital sexual unions (as opposed to other sexual unions).

When mothers and fathers fail to undertake the responsibilities of marriage, government is left to step in to fill the void, at substantial taxpayer cost and of only limited benefit to children.<sup>9</sup> In 2002 alone, more than 75% of all out-of-wedlock births in Washington received Medicaid-paid maternity care at an average cost of \$7000 per delivery.<sup>10</sup> Still, government supports provide only a minimal level of protection for these vulnerable families, as census data show that children in our state living with a single parent remain more than four times as likely to live below

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<sup>8</sup> In Washington State more than 1 in 4 (29%) children born in 2001 were born to unmarried women. Brady Hamilton, et al., *Births: Preliminary Data for 2002*, National Vital Statistics Reports 51(11) (June 25, 2003): 12, Table 5.

<sup>9</sup> According to a report by over one hundred family scholars and civic leaders released in 2000: "Divorce and unwed childbearing create substantial public costs paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms . . . . While no study has yet attempted precisely to measure these sweeping and diverse taxpayer costs stemming from the decline of marriage, current research suggests that these costs are likely to be quite extensive." *The Marriage Movement: A Statement of Principles* (New York, Institute for American Values 2000).

<sup>10</sup> By contrast, married women were less than half as likely (30%) to have their maternity care paid by Medicaid. Among TANF recipients, the difference was even more stark: Roughly 1 out of 3 unwed mothers received TANF funding, compared with just 5 percent of married women giving birth to children in 2002. Amy Ritualo, Laurie Cawthon & Peter Woodcox, *County Profiles, Birth and Unintended Pregnancy Statistics*, Washington State Department of Social and Health Services (April 2004).

the poverty level than are children of married parents.<sup>11</sup>

Plaintiffs contend that, because some same-sex couples are raising children, the redefinition of marriage to include same-sex couples would further the State's interests. Resp. Br. at 65. Presented with similar arguments, the Indiana Court of Appeals flatly rejected this assertion:

This argument does not recognize the key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction. . . . Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. "Natural" procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.

*Morrison v. Sadler*, Case No. 490A2-0305-CV-447, 2005 Ind. App. Lexis 75 at \*19 (January 20, 2005).

The vast majority of children raised by a married couple will enjoy the benefits and advantages of being raised together by their own mother and father – children born and raised outside of marriage seldom do so.<sup>12</sup>

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<sup>11</sup> *Census 2000 Summary File 3*, Poverty Profile 6, PCT52/PCT76 A-I. Poverty Status of Related Children Under 18 Years By Family Type By Race and Hispanic/Latino (available at <http://www.ofm.wa.gov>) (31.3% versus 7.2%).

<sup>12</sup> Studies show that 2 out of 3 children born out of wedlock have nonresident fathers at birth. This percentage climbs as children grow older (though some couples eventually marry). See, e.g., McLanahan, et al., *Unwed Fathers and Fragile Families*, Center for Research on Child Wellbeing, Working Paper #98-12 (March 1998): 7. An Urban Institute policy brief explains the impact: "Parents who do not live with their children are unlikely to be highly involved in their children's lives." Elaine Sorensen & Chava Zibman, *To What Extent Do Children Benefit from Child Support?* The Urban Institute,

Both taxpayers and children suffer when mothers and fathers don't get and stay married. Every man who is attracted to a woman is at risk of entering alternative sexual unions that produce out-of-wedlock births. Thus it is reasonable for the Legislature to prefer that people who are going to engage in sexual relations with someone of the opposite sex do so within the context of a permanent, faithful union. Recognition of a unique legal status called marriage is a reasonable way to promote this interest.

### **C. Marriage Uniquely Contributes to the Perpetuation of Society**

Every society also needs a social institution to encourage men and woman to create and rear the next generation together. In *Skinner v. Oklahoma*, the Supreme Court described procreation itself as an important governmental interest central to our understanding of marriage. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“[M]arriage and procreation are fundamental to the very existence and survival of the race.”). By encouraging men and woman to form faithful, lifelong, public, sexual and parenting unions, the state promotes conditions under which procreation can be encouraged. Nor is this need outdated in our own society. The current problem in developed populations is depopulation, not overpopulation.

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January 2000, at 4 (reporting that just one in three (34%) children with a nonresident parent saw that parent on a weekly basis in 1997, while 28 percent had *no* contact with that nonresident parent during the course of the year.); *see also* Wendy D. Manning & Pamela J. Smock, *New Families and Non-Resident Father-Child Visitation*, *Social Forces*, Sept. 1999, 78(1): 87-116, at 89.

Demographers define “very low fertility” as a birthrate below 1.5 children per woman.<sup>13</sup> Europe’s total fertility rate (TFR) from 1995 to 2000 was 1.42.<sup>14</sup> National leaders are beginning to express alarm at low rates of procreation. In 2000, Russian President Vladimir Putin said in his State of the Union address: “If the current trend persists, the nation’s survival will be threatened.”<sup>15</sup> Japanese Health Minister Chikara Sakaguchi warned in 2002 that if current trends persist, “the Japanese race will become extinct.”<sup>16</sup>

What are the consequences of very low levels of procreation? At the April 2, 2004 meeting the Population Association of American, U.N. demographer Joseph Chamie warned:

A growing number of countries view their low birth rates with the resulting population decline and ageing to be a serious crisis, jeopardizing the basic foundations of the nation and threatening its survival. Economic growth and vitality, defense, and pensions

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<sup>13</sup> John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities*, *Population Studies*, 57(3):241, 241 (2003).

<sup>14</sup> Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat (2003). *World Population Prospects: The 2002 Revision. Highlights*. (New York: United Nations) (February 26, 2003): 4 (Table 2). North America, by contrast has near-replacement level fertility at 2.01 children per woman. *Id.*

<sup>15</sup> Anatoly Zoubanov, “Population Ageing and Population Decline: Government Views and Policies,” paper presented to the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline on October 16-18, 2000 in New York, Population Division, Dept. of Economic and Social Affairs, United Nations: 4.

<sup>16</sup> Reuters, *Japanese Threatened with Extinction, Minister Says* (May 21 2002).

and health care for the elderly, for example, are all areas of major concern.<sup>17</sup>

There is no agreement on the causes of low fertility, which are likely to be complex.<sup>18</sup> But the move away from preferences for marriage, as well as a decline in the extent to which marriage is seen as a childbearing institution, play a clear role:

Low fertility can also be linked to the movement away from marriage, which many western European countries have experienced for the recent decades. Of course, marriage is no longer a pre-condition for childbearing in most of these populations, but it remains true that married couples have a higher fertility than non-married people, even those who live in a “marriage-like” cohabitation.<sup>19</sup>

Whatever the specific causes, the larger point remains: far from making marriage obsolete as a regulator of childbearing, widespread contraceptive and abortion rights may actually make more salient, not less, the traditional role of marriage in encouraging men and women to make the next generation that society needs. The more legal, cultural, and technological choice individuals have about whether or not to have

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<sup>17</sup> Joseph Chamie, “Low Fertility: Can Governments Make a Difference?” Paper presented at the Annual Meeting of the Population Association of America, Boston Massachusetts, April 2, 2004.

<sup>18</sup> For a discussion of theories (and an introduction to the literature on causes of low-fertility), see John C. Caldwell and Thomas Schindlmayr, 2003. “Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities,” *Population Studies*, 57(3): 241-263.

<sup>19</sup> Patrick Festy, 2000. “Looking for European Demography, Desperately?” Paper presented at the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline in New York October 16-18, 2000. Population Division, Department of Economic and Social Affairs, United Nations: 3.

children, the more need there is for a social institution that encourages men and women to have babies together, and creates the conditions under which those children are likely to get the best care.

#### **D. Marriage is a Time-tested and Universal Human Institution Proven to Support a Flourishing Society**

Marriage is a universal human institution. Virtually every known human society has some form of marriage.<sup>20</sup> While the structure of marriage in a particular culture varies considerably, it virtually always has something to do with creating a public (not purely private) sexual union between a man and woman so that socially-valued children have both a mother and a father, and so that society has the next generation it needs.<sup>21</sup>

Why does the marriage idea arise again and again in widely varying societies? Because sexual relationships between men and women create children. Every society must find a way to regulate these relationships, to channel the sexual and reproductive energies of men and women attracted

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<sup>20</sup> William J. Doherty, et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* 8-9 (New York, Institute for American Values 2002) (“At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. . . . [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.”); see also Peter Lubin & Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same-sex Marriage*, 47 Cath. U. L. Rev. 1271 (1998) (reviewing claims of historical precedent for same-sex marriages).

<sup>21</sup> In many cultures, marriage appears very different from the way it appears in our culture. Yet it always has something to do with the public union of men and women. Even in societies where same-sex relationships receive a high degree of cultural approval, these relationships are never confused with marriage. Furthermore, cultural approval of a particular relationship does not require recognition of that relationship as a marriage.

to the opposite sex into the kind of sexual union where (a) childbearing is acceptable because (b) children and society's interests are protected.

By affirming a particular kind of relationship as the social ideal, the state attempts to discourage unmarried childbearing, protect the welfare of children (particularly children of unanticipated pregnancies), and encourage sufficient childbearing within marriage to reproduce the population.<sup>22</sup>

## **II. REDEFINING MARRIAGE WILL CUT OFF THE RATIONAL RELATIONSHIP BETWEEN MARRIAGE AND MANY OF THE PUBLIC GOODS WHICH MARRIAGE FOSTERS**

Not only does the union of a man and woman in marriage uniquely further specific Legislative interests; recognizing marriage as the union of husband and wife is necessary to the furtherance of those interests. That is, the redefinition of marriage to include other relationships would cut off the connection between marriage and many of the public goods which marriage fosters.

In today's sphere of personal autonomy, *Lawrence v. Texas*, 539 U.S. 558 (2003), any governmental preference for marriage over other relationships must be justified by a coherent theory of what governmental

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<sup>22</sup> The law presumes that a marriage will produce children, regulating and affording benefits on the basis of that presumption: "The state has an interest in all opposite-sex couples because all are theoretically capable of procreation." William C. Duncan, *The State Interests in Marriage*, 2 Ave Maria L. Rev. 153, 166 (Spring 2004). That childbearing opportunities inherent in the male/female marital union are occasionally unrealized (*i.e.*, exceptions to the general pattern) does nothing to undermine the basis for the rule of recognition of the special status of traditional marriage.

interests marriage serves. Individuals may find their needs for intimacy and dependency met in a variety of living arrangements, including open (non-exclusive) relationships, threesomes, or group living. If marriage is to be redefined to include same-sex couples, what justification will the state have in preferring and offering benefits only to those who choose same-sex “marriages”? As the Intervenors’ point out, in the absence of an alternative theory which would justify the recognition of same-sex couples over other intimate and dependent relationships, Plaintiffs’ argument becomes not an argument for same-sex marriage, but an argument for the abolition of marriage as a legal status and the extension of its benefits to all intimate and dependent relations. Interv. Br. at 44-45.

**A. Redefining Marriage Will Undermine the Message That Mothers and Fathers Both Matter to Their Children**

In endorsing same-sex marriage, law and government will be making a powerful statement: our government no longer believes children deserve mothers and fathers. Two fathers or two mothers are not only just as good as a mother and a father, *they are just the same*.

The government promotion of this idea will likely have some effect even on people who are currently married, who have been raised in a particular culture of marriage. But the Legislature may reasonably expect this new idea of marriage, sanctioned by law and government, would have a dramatic effect as the next generation’s attitudes toward marriage,

childbearing, and the importance of mothers and fathers are formed. If two mothers are just the same as a mother and a father, for example, why can't a single mother living with her mom (the child's grandmother) do just as well as a married mother and father? Why are dads relevant at all?

Two ideas are in conflict here: one is that children deserve mothers and fathers and that adults have an obligation to at least try to conduct their sexual lives to give children this protection. This is the marriage idea. The other idea is that adult interests in sexual liberty are more important than "imposing" or preferring any one family form, even for the benefit of children: all family forms must be treated identically by law if adults are to be truly free to make intimate choices. This latter idea is at the heart of the idea that same-sex marriage is a civil right. And it is the core idea that must be rejected if the state's interest in marriage is to be sustained.

**B. Personal Commitments to Love, Self-expression, Self-realization, or Long-term Relationships Cannot Alone Justify the State's Involvement in Marriage**

Marriage is separated from other kinds of relationships by law and government as well as society because it is not merely a private, individual good, but a public, common good. Even people who do not marry depend on a healthy marriage culture to carry society into the next generation.

If marriage is an essentially private, intimate, emotional relationship created by two people to enhance their own personal well-being, it is

wrong, discriminatory, and counterproductive for the state to favor certain kinds of intimate relations over others. Each person has the right to express socially his or her own preferred inner vision of family, sexuality and intimacy on an equal basis. There is no longer any rational reason, therefore, to withhold these benefits from any couple, cohabiting, same-sex, or other, who wishes to claim them on behalf of themselves or (especially) their dependents.

From this perspective, marriage is no longer a social institution regulated by law in order to support important public objectives, but is reduced to an emotionally laden ceremony which confers various legal benefits. As one family scholar has stated:

There are many problems with this vision of marriage and its relationship to law. It reduces marriage to a creature of the state. By emphasizing the rights of adults, it intrinsically devalues the interest of children and the community in marriage. By reducing marriage to an individual right, it undermines the very norms of commitment it rhetorically upholds. It logically calls into question the notion of family law itself. If the purpose of marriage and family law is to affirm neutrally the multiplicity of adult emotional choices, because individual declarations of intimacy are sacred matters in which the state has no right to interfere, then the question becomes: why do we have laws about marriage at all?

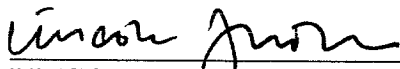
Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 *Notre Dame J.L. Ethics & Pub. Pol'y* 225, 231 (2004).

## CONCLUSION

In general, the more personal and intimate the adult relationship, the less likely it is to be regulated by law. This is true of very highly valued relationships (best friends) even when the relation involves substantial intimacy and caretaking (an adult son and his aging mother). Why is marriage then the exception? Marriage arises in every society, including our own, out of the need for a social institution that manages the reality that sex between men and women makes babies. Marriage laws are a society's way of recognizing that the sexual union of a man and a woman is unique, and laws governing marriage are oriented toward supporting its unique benefits to society and its children. Adults are free to live as they choose, but the Legislature is constitutionally entitled to prefer marriage, defined as the union of husband and wife, because it is the only relation which furthers the State's interest in (a) creating the next generation within (b) the ideal context for children. Marriage is the only kind of sexual union that is physically capable of uniting men and woman with the children their sexual unions often produce.

This Court should reverse the judgment below.

Respectfully submitted this 3rd day of February, 2005.



LINCOLN J. MILLER, WSBA #25306  
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## DECLARATION OF SERVICE

ALICIA M. OSSENKOP declares as follows:

That I am a citizen of United States of America and a resident of the state of Washington, over the age of 18 years and not a party to this action. On the date indicated below I caused to be served in the manner noted a copy of the Brief of Amicus Curiae Families Northwest, and Motion for Leave To File Amicus Curiae Brief on Behalf of Families Northwest, the documents to which this certificate is attached, on the following:

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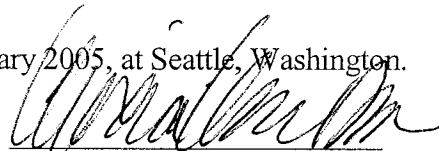
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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 14<sup>th</sup> day of February 2005, at Seattle, Washington.



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