No. 75934-1
Consolidated with No. 75956-1

SUPREME COURT OF THE STATE OF WASHINGTON

HEATHER ANDERSON, et al., *Respondents*,
v.
KING COUNTY, et al., *Appellants*,
v.
STATE OF WASHINGTON, *Appellant*,
v.
SENATOR VAL STEVENS, et al., *Intervener Appellants*.

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

CELIA CASTLE, et al., *Respondents*,
v.
STATE OF WASHINGTON, *Appellant*.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 1

ARGUMENT 1

I. THERE IS NO FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 2

A. The Trial Court's Decision Characterizing the Right to Same-Sex Marriage as a General Right to Marriage Flies in the Face of the Supreme Court's Holding in *Washington v. Glucksberg* that New Rights Asserted Under the Due Process Clause Be Described with Careful Specificity. 3

B. *Glucksberg* Requires Rejection of Any Attempt to Bootstrap a New Right to Same-Sex Marriage Onto the Fundamental Right to Marry. 5

C. There Is Absolutely No National Consensus That Same-Sex Marriage Is "Implicit In the Nation's Concept of Ordered Liberty." 8

D. The Supreme Court's Decision in *Baker v. Nelson* Holding that There Is No Fundamental Right to Same-Sex Marriage Is Binding On This Court. 10

E. The Supreme Court's Decision in *Lawrence v. Texas* Lends No Support to the Argument that Same-Sex Marriage Is A Fundamental Right. 11

II. SUPREME COURT DECISIONS ESTABLISHING MARRIAGE AS A FUNDAMENTAL RIGHT ARE PREMISED ON THE INEXTRICABLE LINK BETWEEN MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN, AND THE PROCREATION THAT TYPICALLY RESULTS FROM THAT UNION. 14

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) 2

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) 10, 11

Baker v. Vermont, 744 A.2d 864 (Vt. 1999) 2

Bowers v. Hardwick, 478 U.S. 186 (1986) 13

Collins v. Harker Heights, 503 U.S. 115, 125 (1992) 3

Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003) 2, 8, 9, 16

Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) 15, 16

Hicks v. Miranda, 422 U.S. 322, 344 (1975) 10, 11

Jackson v. Rosenbaum, 260 U.S. 22, 31 (1922) 7

Lawrence v. Texas, 539 U.S. 558 (2003) 11, 12, 13

Lofton v. Sec'y of the Dept of Children and Family Services, 358 F.3d 804, 817 (11th Cir. 2004). 13

Loving v. Virginia, 388 U.S. 1, 12 (1967) 15, 18, 19

McConnell v. Nooner, 547 F.2d 54, 55-56 (8th Cir. 1976) 11

Michael H. v. Gerald D., 491 U.S. 110 (1989) 6, 7

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 2, 3, 5

Morrison v. Sadler, No. 49A02-0305-CV-447 (Ind. Ct. App., January 20,

2005) 11

Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1957) 11

Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937) 3

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 14

Reno v. Flores, 507 U.S. 292 (1993) 6, 7

Samuels v. New York Department of Health, No. 1967-04 RJI No. 10104077742 (N.Y. S. Ct. Albany Cty., December 4, 2004) 13

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) 15

Snyder v. Massachussetts, 291 U.S. 97, 105 (1934) 3

Standhardt v. Superior Ct of Ariz., 77 P.3d 451 (Ariz. Ct. App. 2003) 13, 14

Troxel v. Granville, 530 U.S. 57, 76 (2000) 2

Turner v. Safley, 482 U.S.78 (1987) 16, 18, 19

Washington v. Glucksberg, 521 U.S. 702 (1997) . . . . *passim*

Wilson v. Ake, No. 8:04-cv-1680-T-30TBM (M.D. Fla., January 19, 2005) 11, 13

Wilson v. Attorney General of Alabama, 378 F.3d 1232, 1250 (11th Cir. 2004) 7

Zablocki v. Redhail, 434 U.S. 374, 386 (1978) 15

Statutes

Federal

Defense of Marriage Act, 1 U.S.C. § 7 (2000) 9, 10

28 U.S.C. § 1257(2) 10

State:

Ala. Code § 30-1-19 (2002) 9

Alaska Const. art. I, §§ 25 9

Ariz. Rev. Stat. § 25-101 (2002) 9

Ark. Code Ann. § 9-11-109 (2002) 9

Ark. Proposed Const. Amend. §9-11-109 (2004) 9

Cal. Fam. Code § 308.5 (Deering 2003) 9

Col. Rev. Stat. 14-2-104 (2002) 9

Del. Code Ann tit. 13, §§ 101 (2002) 9

Fla. Stat. ch. 741.212 (2004) 9

Ga. Code Ann. § 19-3-3.1 (2002) 9

Ga. Const. Art. I §4 (2004) 9

Hawaii Const. art. I, §§ 23 (2002) 9

Hawaii Rev. Stat. § 572-1 (2002) 9

Idaho Code § 32-201 (Michie 2002) 9

750 Ill. Comp. Stat. 5/213.1 (2003) 9

Ind. Code Ann. § 31-11-1-1 (Michie 2002) 9

Iowa Code § 595.2 (2002) 9

Kan. Stat. Ann. § 23-101 (2001) 9

Ky. Rev. Stat. Ann. §§ 402.005 & 402.020 (Michie 2002) 9

Ky. Const. §233a 9

La. Civ. Code Ann. art. 89 & 3520 (West 2003) 9

La. Const., art. XII, §15 9

Me. Rev. Stat. Ann. tit. 19-A, §§ 701 (West 2001) 9

Md. Code Ann., Fam. Law § 2-201 (2002) 9

Mich. Ballot Proposal 04-2 (2004) 9

Mich. Comp. Laws § 551.1 (2002) 9

Minn. Stat. § 517.03 (2002) 9

Miss. Code Ann. § 93-1-1 (2002) 9

Miss. Const. §A, art. I §33 9

Mo. Rev. Stat. § 451.022 (2002) 9

Mont. Code Ann. § 40-1-401 (2002) 9

Mont. Const. §1, art. XIII §7 9

Nebraska Const. Art I §29 9

Nev. Const. Art I, §21 9

Nev. Rev. Stat. §122.020 (2002) 9

N.H. Rev. Stat. Ann. §§ 457:1 & 457:2 (2002) 9

N.C. Gen. Stat. § 51-1.2 (2002) 9

N.D. Cent. Code § 14-03-01 (2002) 9

N.D. Const. art. XI, §1 9

Ohio Const. art. XV, §11 9

Ok. Const. art II, §35; 2004 9

Okla. Stat. tit. 43, § 3.1 (2003) 9

Ore. Ballot Measure 36 9

23 Pa. Cons. Stat. § 1704 (2002) 9

S.C. Code Ann. § 20-1-15 (2002) 9

S.D. Codified Laws § 25-1-1 (Michie 2002) 9

Tenn. Code Ann. § 36-3-113 (2002) 9

Utah Code Ann. § 30-1-2 (2003) 9

Utah Const., art. I, §29 9

Vt. Stat. Ann. tit. 15, § 8 (2002) 9

Va. Code Ann. § 20-45.2 (2002) 9

Wash. Rev. Code § 26.04.010 (2002) 9

Wis. Stat. § 765.001 (2002) 9

Wyo. Stat. Ann. § 20-1-101 (Michie 2002) 9

Other Authorities

H.R.J. 106 111th Cong. (2004) 10

Mem. Op. (Downing, J.) 11, 16, 17, 18

Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 682-83. . . . . 5, 7-8

S.J. Res. 40, 108th Cong. (2004) 10

Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 Regent U. L. Rev. 121 (2003-2004) . . . 12, 20

INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is a public interest law firm dedicated to protecting Constitutional freedoms and to preventing the erosion of traditional moral values via judicial fiat. The ACLJ is committed to preserving the traditional institution of marriage as the union of one man and one woman, and therefore opposes efforts to take public debates on moral issues, including the definition of marriage, out of the legislative process through the minting of new rights under federal and state constitutions. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States, as well as lower federal and state courts.

STATEMENT OF THE CASE

Amicus, ACLJ, incorporates the Statement of the Case set forth in Appellants' brief.

ARGUMENT

Despite a total dearth of authority for much of its analysis, the court below redefined marriage for the entire state of Washington. The court reasoned that the United States Supreme Court's decisions establishing marriage as a fundamental right were not limited to the historic understanding

of marriage as a union of one man and one woman. The trial court's novel ruling was based on a flawed understanding of the Supreme Court's marriage decisions, as well as a complete disregard for the Court's substantive due process jurisprudence. Indeed, even those courts holding that their state constitutions afforded homosexuals the right to same-sex marriage or civil unions stopped short of declaring that same-sex marriage is a fundamental right. *See, e.g., Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 969-970 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

I. THERE IS NO FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

For at least two decades now, the Supreme Court of the United States has been leery of "turning any fresh furrows in the 'treacherous field' of substantive due process." *Troxel v. Granville*, 530 U.S. 57, 76 (2000) (Souter, J., concurring); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). As Justice Powell explained in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977):

> We "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to

> a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.
>
> Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.

Id. at 502 (citations omitted); *see also Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

Thus, the Court generally has abstained (with the exception of the abortion cases) from grafting new rights onto the Due Process Clause unless the asserted rights "are so rooted in the traditions and conscience of our people," *Snyder v. Massachussetts*, 291 U.S. 97, 105 (1934) as to be "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

A. The Trial Court's Decision Characterizing the Right to Same-Sex Marriage as a General Right to Marriage Flies in the Face of the Supreme Court's Holding in *Washington v. Glucksberg* that New Rights Asserted Under the Due Process Clause Be Described with Careful

Specificity.

The Supreme Court held in *Washington v. Glucksberg*, 521 U.S. 702 (1997) that new rights asserted under the Due Process Clause should be defined with careful specificity.

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision making," that direct and restrain our exposition of the Due Process Clause.

Id. at 720-21 (internal citations omitted). Thus in *Glucksburg*, the Court refused to accept the Respondent's characterization of the issue as whether the Due Process Clause provides a right for mentally competent, terminally ill adults to "bring about impending death in a certain, humane and dignified manner." *See* Brief for Respondents at i, *Washington v. Glucksberg*, 521 U.S. 702. Rather, the issue precisely defined was whether the Due Process Clause "includes a right to commit suicide which itself includes a right to assistance in doing so." 521 U.S. at 723.

Carefully describing the asserted liberty interest is crucial lest the Due Process Clause be transformed into nothing more than the policy preferences

of the members of the courts. *See Moore v. City of East Cleveland*, 431 U.S. at 502. *See also Glucksberg*, 521 U.S. at 722 (A careful description of the asserted liberty interest "tends to rein in the subjective elements that are necessarily present in due process review"). Broad characterizations, like that drawn by the trial court in this case, suggest facile conclusions that avoid the real issue. As legal scholar Michael McConnell has trenchantly observed:

> We might be able to agree on highly generalized principles like "human dignity," "fair play," or "equal concern and respect," but how those abstractions will apply to such specific questions as affirmative action, capital punishment, or proper modes of service of process (to name a few examples) is a matter of disagreement among reasonable people. The attraction of natural law is its seemingly universal reasonableness; but specific applications to specific issues lose that quality of universality. When a court announces that the abstract principle of "equal concern and respect" mandates (or precludes) affirmative action, or the principle of personal autonomy mandates (or precludes) assisted suicide, the judge is not in any realistic sense "applying" natural law, but is merely applying his own opinion about affirmative action or assisted suicide. There is no reason the judge's opinion should prevail over that of the people.

Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 682-83.

B. *Glucksberg* Requires Rejection of Any Attempt to Bootstrap a New Right to Same-Sex Marriage Onto the Fundamental Right to Marry.

The Supreme Court repeatedly has rejected efforts to bootstrap new rights to extant fundamental rights on the grounds that there is (allegedly)

little difference between them. For example, in *Glucksberg*, the Court dismissed the argument that there is no constitutionally significant difference between the fundamental right to refuse medical treatment and the right to assisted suicide:

> The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.

521 U.S. at 725.

Similarly in *Reno v. Flores*, 507 U.S. 292, 302 (1993), the Court held that "freedom from physical restraint" did not include the right "of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." And in *Michael H. v. Gerald D.*, 491 U.S. 110, 126 (1989), the Court held that the right to sanctity of family relationships does not translate into a right by a natural father to assert parental rights over a child born into a woman's existing marriage with

another man, who raised the child as his own.

In each case, the history and legal traditions behind the asserted right were central to the Court's decisions. *Glucksberg*, 521 U.S. at 711-16; *Reno*, 507 U.S. at 303 ("the mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it"); *Michael H.*, 491 U.S. at 126-27. *Cf. Jackson v. Rosenbaum*, 260 U.S. 22, 31 (1922) (A two hundred-year-old tradition "will need a strong case for the Fourteenth Amendment to affect it"). The Court's reliance on history and tradition is at bottom an act of judicial humility that serves the end of collective self-government. For the Court to assert without fairly explicit textual support that the Constitution affords fundamental protections to activities that the people and their elected legislators historically have restricted or even prohibited would negate the people's authority to govern themselves by laws of their own making. *See Wilson v. Attorney General of Alabama*, 378 F.3d 1232, 1250 (11th Cir. 2004) (Once a right is elevated to a fundamental right, it "is effectively removed from the hands of the people and placed into the guardianship of unelected judges. We are particularly mindful of this fact in the delicate area of morals legislation"). As Judge McConnell has pointed out:

> No single vote, no single electoral victory, no single jurisdiction suffices to establish a tradition: it requires the acquiescence of many

> different decision makers over a considerable period of time, subject to popular approval or disapproval. When judges base their decisions either on constitutional text or on longstanding consensus, they do not usurp the right of the people to self-government, but hold the representatives of the people accountable to the deepest and most fundamental commitments of the people.

See McConnell, *supra*, 1997 Utah L. Rev. at 682 (emphasis added).

The right to same-sex marriage may implicate choices about intimate associations, but the Supreme Court's substantive due process cases as well as the Nation's legal traditions and current legal practices establish that the traditional marital union of a man and a woman has always been regarded as quite distinct from other sexual relationships.

C. There Is Absolutely No National Consensus That Same-Sex Marriage Is "Implicit In the Nation's Concept of Ordered Liberty."

While attitudes toward sexual morality, including homosexuality, have undoubtedly grown more permissive in the past two decades, it would be patently untrue to say that the nation has reached a stable and abiding consensus that the right to same-sex marriage is implicit in the nation's concept of ordered liberty. Only one state in the union confers a marriage license on same-sex couples and that state had same-sex marriage foisted upon it by four unelected judges. *Goodridge v. Dep'ts of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). A constitutional amendment has been proposed

in Massachusetts to undo the *Goodridge* decision.

Attempts to persuade the nation that same-sex intimate relationships must be treated equally with heterosexual marriage have been overwhelmingly repudiated. Sixteen states have constitutional amendments banning same-sex marriage.[1] In addition, thirty-nine states have legislation banning same-sex marriage.[2]

In 1996, the federal government passed The Defense of Marriage Act, which reflects a national policy judgment that the marital relationship is to be preserved as a union between "one man and one woman," not available to

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[1] Alaska Const. art. I, §§ 25; Ark. Proposed Const. Amend. §9-11-109 (2004); Ga. Const. Art. I §4 (2004); Hawaii Const. art. I, §§ 23 (2002); Ky. Const. §233a ; La. Const., art. XII, §15; Mich. Ballot Proposal 04-2 (2004); Miss. Const. §A, art. I §33; Mont. Const. §1, art. XIII §7; Nebraska Const. Art I §29; Nev. Const. Art I, §21; N.D. Const. art. XI, §1; Ohio Const. art. XV, §11; Ok. Const. art II, §35; 2004 Ore. Ballot Measure 36; Utah Const., art. I, §29.

[2] Ala. Code § 30-1-19 (2002); Ariz. Rev. Stat. § 25-101 (2002); Ark. Code Ann. § 9-11-109 (2002); Cal. Fam. Code § 308.5 (Deering 2003); Col. Rev. Stat. 14-2-104 (2002); Del. Code Ann tit. 13, §§ 101 (2002); Fla. Stat. ch. 741.212 (2004); Ga. Code Ann. § 19-3-3.1 (2002); Haw. Rev. Stat. § 572-1 (2002); Idaho Code § 32-201 (Michie 2002); 750 Ill. Comp. Stat. 5/213.1 (2003); Ind. Code Ann. § 31-11-1-1 (Michie 2002); Iowa Code § 595.2 (2002); Kan. Stat. Ann. § 23-101 (2001); Ky. Rev. Stat. Ann. §§ 402.005 & 402.020 (Michie 2002); La. Civ. Code Ann. art. 89 & 3520 (West 2003); Me. Rev. Stat. Ann. tit. 19-A, §§ 701 (West 2001); Md. Code Ann., Fam. Law § 2-201 (2002); Mich. Comp. Laws § 551.1 (2002); Minn. Stat. § 517.03 (2002); Miss. Code Ann. § 93-1-1 (2002); Mo. Rev. Stat. § 451.022 (2002); Mont. Code Ann. § 40-1-401 (2002); Nev. Rev. Stat. §122.020 (2002); N.H. Rev. Stat. Ann. §§ 457:1 & 457:2 (2002); N.C. Gen. Stat. § 51-1.2 (2002); N.D. Cent. Code § 14-03-01 (2002); Okla. Stat. tit. 43, § 3.1 (2003); 23 Pa. Cons. Stat. § 1704 (2002); S.C. Code Ann. § 20-1-15 (2002); S.D. Codified Laws § 25-1-1 (Michie 2002); Tenn. Code Ann. § 36-3-113 (2002); Utah Code Ann. § 30-1-2 (2003); Vt. Stat. Ann. tit. 15, § 8 (2002); Va. Code Ann. § 20-45.2 (2002); Wash. Rev. Code § 26.04.010 (2002); Wis. Stat. § 765.001 (2002); Wyo. Stat. Ann. § 20-1-101 (Michie 2002).

same-sex couples, or for that matter, any other groupings of people. 1 U.S.C. §§ 7 (2000). More significantly, Congress has proposed an Amendment to the United States Constitution defining marriage as a union between one man and one woman. S.J. Res. 40, 108th Cong. (2004); H.R.J. 106 111th Cong. (2004).

Thus, an overwhelming national consensus exists that marriage should be reserved exclusively for the union of one man and one woman.

D. The Supreme Court's Decision in *Baker v. Nelson* Holding that There Is No Fundamental Right to Same-Sex Marriage Is Binding On This Court.

In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed,* 409 U.S. 810 (1972), the Supreme Court dismissed an appeal from a Minnesota Supreme Court decision holding that there is no fundamental right to same-sex marriage. 191 N.W.2d at 186-87. Supreme Court jurisdictional rules required the Court to adjudicate the case on the merits, *see* 28 U.S.C. §1257(2), and the Court held that there was no substantial federal question presented in the case.

A dismissal for lack of a substantial federal question is an adjudication on the merits. *See Hicks v. Miranda*, 422 U.S. 322, 344 (1975) (though Court not required to give case "plenary consideration," it was

required to decide the case on the merits); *see also Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 (1957) (dismissal for lack of a substantial federal consideration is a resolution on the merits). Lower courts, including this Court, are bound by summary decisions from the Supreme Court. *Hicks*, 422 U.S. at 344-45; *McConnell v. Nooner*, 547 F.2d 54, 55-56 (8th Cir. 1976).

In *Wilson v. Ake*, No. 8:04-cv-1680-T-30TBM (M.D. Fla., January 19, 2005), the United States District Court for the Middle District of Florida held that *Baker v. Nelson* was dispositive on the question whether a lesbian couple had a fundamental right to marry. The court reasoned "[t]he Supreme Court has not explicitly or implicitly overturned its holding in *Baker* or provided the lower courts, including this Court, with any reason to believe that the holding is invalid today." Slip Op. at 9. *See also Morrison v. Sadler*, No. 49A02-0305-CV-447 (Ind. Ct. App., January 20, 2005) (same). Likewise, this Court is bound by *Baker v. Nelson*.

E. The Supreme Court's Decision in *Lawrence v. Texas* Lends No Support to the Argument that Same-Sex Marriage Is A Fundamental Right.

The trial court also held that the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) supported its ruling that same sex marriage is a fundamental right. Mem. Op. at 14 (Downing, J.). *Lawrence*,

however, is not about the right to have state sanction of an intimate relationship. It is essentially about the right to be let alone.

In *Lawrence*, the Supreme Court held that the Constitution gives homosexuals the right to "choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons." *Id.* at 567. *Lawrence* bears only on what homosexuals may do in the privacy of their home; it does not command the public to call homosexual relationships marriages. What plaintiffs in this case seek, however, is not to be let alone. They seek to be accorded public recognition, status, and benefits. The trial court converted the privacy and liberty shield created in *Lawrence* into a public policy sword which states that homosexual conduct must be publicly acknowledged, condoned, recognized, and normalized. *See* Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 Regent U. L. Rev. 121, 127 (2003-2004).

Moreover, the *Lawrence* Court explicitly cautioned against taking its holding too far. *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578.

Finally, although *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court studiously avoided holding that homosexuals have a fundamental right to engage in sodomy. The Court did not engage in the substantive due process analysis traditionally used in determining whether it should announce a new fundamental right. *See Glucksberg*, 521 U.S. at 720-21. Nor did the Court apply strict scrutiny to the plaintiffs' claims. Rather, the Court held that the Texas sodomy law served no rational purpose. *Lawrence*, 539 U.S. at 578. Thus, "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right." *Lofton v. Sec'y of the Dept of Children and Family Services,* 358 F.3d 804, 817 (11th Cir. 2004).

With the exception of the court below, every court that has considered the impact of *Lawrence* on the issue of same-sex marriage has concluded that it does not support the minting of a new fundamental right. *See Wilson v. Ake*, No. 8:04-cv-1680-T-30TBM (M.D. Fla., January 19, 2005); *Standhardt v. Superior Ct of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Samuels v. New York Department of Health*, No. 1967-04 RJI No. 10104077742 (N.Y. S. Ct. Albany Cty., December 4, 2004).

In similar vein, the trial court erred in concluding that the mystery

passage in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)[3] should be construed as mandating same-sex marriage. *Casey* in no way altered the test for locating new fundamental rights in the Due Process Clause. *Casey* merely allows a homosexual "to define his or her own existence" by entering into a homosexual relationship, but not to "enter a state-sanctioned, same-sex marriage." *See Standhardt*, 77 P.3d at 457. Fuzzy notions about existence, meaning and mystery simply cannot serve as crucial "guideposts for responsible decision making." *Glucksberg*, 521 U.S. at 721.

II. SUPREME COURT DECISIONS ESTABLISHING MARRIAGE AS A FUNDAMENTAL RIGHT ARE PREMISED ON THE INEXTRICABLE LINK BETWEEN MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN, AND THE PROCREATION THAT TYPICALLY RESULTS FROM THAT UNION.

The Supreme Court's pronouncements on marriage as a fundamental right consistently emphasize the inextricable and profoundly important link between marriage and child-rearing. This link is why marriage as a union between a man and a woman is so important to society. It is not important merely because it is an intimate and personal choice associated with defining

[3] In *Casey*, a plurality of the Court discovered in the Fourteenth amendment a right to make "intimate and personal choices" that reflect one's concept of "meaning," "existence" and "the universe." 505 U.S. at 851.

one's existence. It is important because almost all of the nation's children are born as a result of sexual relations between a man and a woman, and society recognizes that those children thrive best when the man and woman who procreated them are committed to each other in a lifelong relationship and to raising those children within that relationship. State sanctioned unions between one man and one woman are important because "marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

In *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) the Court reemphasized this connection between marriage, procreation, and child-rearing by placing the "decision to marry" on "the same level of importance as decisions relating to procreation, childbirth, child-rearing, and family relationships." The Court reasoned that if the "right to procreate means anything at all, it must imply some right to enter" the marital relationship. *Id.* In *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring), Justice Goldberg also stressed the indissoluble relationship between marriage and procreation.

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital

> privacy and to *marry and raise a family* are of similar order and magnitude as the fundamental rights specifically protected.
>
> Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family - a relation as old and as fundamental as our entire civilization - surely does not show that the Government was meant to have the power to do so.

Id. at 495 (emphasis added).

The trial court asserted that the Supreme Court has not linked marriage with procreation, because in *Turner v. Safley*, 482 U.S.78 (1987), the Court discussed other attributes of marriage such as emotional support and state benefits, and because the inmates who desired to marry were not capable of procreating because their incarceration prevented them from consummating their marriage. Mem. Op. at 13 (*citing Turner*, 482 U.S. at 95-96) (Downing, J). The trial court misread *Turner*.

First of all, the Supreme Court did note that the inmates who married would eventually consummate their marriage because most of them would be released from prison. 482 U.S. at 96. More importantly however, the trial court confused attributes of marriage with the state's interest in protecting marriage. Quoting the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Health*, 798 N.E.2d 941, 961 (2003), the lower court opined

"it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." Mem. Op. at 13 (Downing, J).

To be sure, marriage is a permanent exclusive commitment, but the state's purpose in sanctioning marriage is not to ensure that couples have children. The state's interest in sanctioning marriage is to encourage individuals whose sexual activity results in children to be married to each other. That some married couples do not have children is immaterial to society's interest in promoting an institution that responsibly channels procreation. Those who argue that same-sex couples should be allowed to marry because there is no necessary link between marriage and procreation entirely miss the point. If any two or more individuals can "marry" and secure all of the benefits of civil marriage, then state sanctioned marriage is divested of its primary purpose: encouraging responsible procreation.

That some same-sex couples couples adopt children, or produce them with third party assistance also does not bear on the point that society's interest in protecting the institution of marriage derives from its interest in responsible procreation. Sodomy can never produce children. Only a minute percentage of all children born are the result of technological intervention in

human reproduction. The overwhelming majority of children are the result of sexual relations between a man and a woman. Thus, society's profound interest in channeling responsible procreation into marriage relationships between the man and woman who produce the children is not in the least diminished by the fact that some same-sex couples can adopt children, or produce them through third party intervention.

The lower court also reasoned that because there was "no deeply rooted tradition of interracial marriage" when *Loving v. Virginia* was decided, nor was there a deeply rooted tradition of "inmate marriage" when *Turner v. Safley* was decided, the Court's cases cannot be understood to embrace the centuries-old definition of marriage as limited to a man and a woman. Mem. Op. at 11-12 (Downing, J.) . According to the trial court, the fundamental right at issue is a very loosely defined concept: marriage is a "join[ing] together in a close and permanent way." Mem Op. at 5 (Downing, J). Of course, under the trial court's lax definition, any two or more people could "marry."

It is absurd to suggest that the Supreme Court's marriage cases are not limited to the historical institution of marriage as a union of one man and one woman. All of the Court's marriage case are anchored to the traditional

definition of marriage. *Loving* and *Turner* effected no change to the intrinsic nature as a unique union of a man and a woman. Both cases involved marriage between a man and a woman. They did not, as the trial court did, redefine marriage. The trial court's reasoning is akin to claiming that eliminating home plate, the bat and the ball effects no greater change to the game of baseball than the designated hitter rule. This Court should reject the effort to trivialize the profound effect same-sex marriage would have on our society by comparing it to interracial marriage or "inmate marriage."

By giving special status, benefits, and protection to heterosexual monogamous marriage, society demonstrates its commitment to the institution as a uniquely valuable form of human interaction, and the only sexual union capable of producing children. To give the same status, benefits and protection to relationships that do not share the characteristics that make marriage uniquely valuable – that is, to call something marriage that is not really marriage – will at best blur the message that marriage is uniquely valuable. As one commentator observed:

> should constitutional law abandon the principle that reproductive sex has a unique role, there will be no basis left upon which to draw principled constitutional distinctions between sexual relations that are harmful to individuals or society, and relations that are beneficial. In fact, the same arguments that would seemingly require constitutional protection for same-sex marriage would also require constitutional

> protection for any consensual sexual practice or form of marriage. After all, once the principled line of procreation is abandoned, we are left with nothing more than sex as a purely sensory experience.

Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 Regent U. L. Rev. 121, 133 (2003-2004).

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's judgment and order summary judgment in favor of Appellants.

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No. 75934-1
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SUPREME COURT OF THE STATE OF WASHINGTON

HEATHER ANDERSON, et al., *Respondents*,
v.
KING COUNTY, et al., *Appellants*,
v.
STATE OF WASHINGTON, *Appellant*,
v.
SENATOR VAL STEVENS, et al., *Intervener Appellants*.

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

CELIA CASTLE, et al., *Respondents*,
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STATE OF WASHINGTON, *Appellant*.

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

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