

## **INTEREST OF THE *AMICUS***

Amicus curiae is the Marriage Law Foundation, a nonprofit organization that provides legal resources to organizations and individuals charged with affirming the legal definition of marriage as the union of a man and a woman. The Foundation provides its resources on a charitable basis. The Officers of the Foundation are attorneys who have been involved in the effort to reaffirm marriage. Their experience includes submitting amicus briefs in cases challenging the definition of marriage in Vermont, Massachusetts and a number of other states. In addition, Foundation attorneys have authored nearly two dozen journal articles on constitutional and family law issues.

Recently, an article by Foundation president Monte N. Stewart was prominently relied on in a decision by the Indiana Court of Appeals rejecting a claim for the redefinition of marriage in that state. *Morrison v. Sadler*, 2005 WL 107151 (Ind. Ct. App. 2005). The primary purpose of this brief is to draw this Court's attention to this important decision, the rationale of which may well be of considerable assistance to this Court in the resolution of this case.

## **INTRODUCTION**

This case challenges the State of Washington's long-standing definition of marriage as the union of a man and a woman. *Vasquez v.*

*Hawthorne*, 994 P.2d 240, 243 note 3 (Wash. 2000). Plaintiffs particularly single out RCW §§26.040.010 & 26.040.020 for attack, alleging a variety of constitutional infirmities including violation of the Privileges and Immunities Clause. WASH. CONST., art. I, sec. 12. The courts below concluded that marriage, as defined in Washington statutes, violates the Privileges and Immunities Clause. Andersen Memo. Op. At 22; Castle Memo. Op. At 36. In doing so, the courts rejected defendants’ and intervenors’ proffered justifications for the marriage policy of the state. Andersen Memo. Op. at 15-22; Castle Memo. Op. at 30-35.

Amicus Marriage Law Foundation generally adopts the Attorney General’s Statement of the Case.

## ARGUMENT

### **BECAUSE SOCIETY’S DEEP LOGIC OF MARRIAGE, WITH ITS PRIVATE WELFARE PURPOSE, IS PROFOUNDLY RATIONAL, EVEN COMPELLING, THE LIMITATION OF MARRIAGE TO THE UNION OF A MAN AND A WOMAN IS CONSTITUTIONAL.**

Central to the decisions below are the findings that the marriage policy of Washington conflicts with the constitutional prohibition on the unequal distribution of privileges and immunities. WASH. CONST., art. I, sec. 12. This Court has been extensively briefed on the proper standard for applications of this constitutional provision. Brief of Appellant King County at 38-45; Brief of Intervenors at 9-15; Reply Brief of Appellant

State of Washington at 1-26; Reply Brief of Appellant King County at 20-34; Intervenor's Reply Brief at 19-31.

We will not repeat any of these arguments. But since the briefing in this case, a case similar in facts and allegations has been decided by the Indiana Court of Appeals. *Morrison v. Sadler*, 2005 WL 107151 (Ind. Ct. App. 2005) (page numbers below refer to slip opinion online at <http://www.in.gov/judiciary/opinions/new/morrison-sadler.pdf>). We believe this decision well and helpfully analyzes one of the state interests served by Washington's marriage law and is thus relevant to the decision in this case. Although other important governmental interests have been identified by the State of Washington (Brief at 34-38), King County (Reply Brief at 14-19), and Intervenor (Brief at 35-44), this brief will focus on only the discrete interest associated with the uniquely procreative nature of the sexual relationship between a man and a woman.

*Characterization Of The State Interest Relative To Procreation*

The courts below examined both stated and (what the courts assumed were) unstated justifications for the definition of marriage in this State. In response to the State's assertion of a link between marriage and procreation, the Andersen memorandum opinion characterizes the state interest as "encouraging procreation and the raising of children in a

healthy, nurturing environment” and concludes that “there is no logical way” to conclude that the law’s definition of marriage “somehow serves the interest of encouraging procreation” or that redefining marriage to include same-sex couples would injure the state interest “in the support of families and the nurturance of children.” Memo. Op. At 18-19. The court supported these conclusions by noting that some children are born and raised outside of marriages, including by same-sex couples and could be beneficiaries of the benefits associated with marriage if these were offered to the adults raising them. Memo. Op. at 18, 20.

The Castle memorandum opinion repeats the proffered interests and, without explanation, calls them “Lilliputian.” Memo. Op. at 30. Later, the opinion characterizes one state interest as “the need to produce children” (which it believes may not be valid because of concerns for overpopulation) and supports its rejection by also noting that partners in same-sex couples can use assisted reproductive techniques to conceive children or can adopt. These children, the court held, could be benefitted if the partners could marry. Memo Op. at 30-33.

The briefs of plaintiffs before this court make similar characterizations of the state interest in marriage. The Andersen Brief of Respondents says the State of Washington is arguing that its marriage law

“furthers and protects procreation” (at 63) and the Castle Brief of Respondents says the State defines marriage to “promote reproduction” (at 32). Both briefs are dismissive of these interests they claim the state is asserting. Like the memorandum opinions, they say that children can be born to persons who are unmarried and that some married couples do not have children and are not required to by law.

*Misunderstandings of the State’s Interest in Marriage*

The opinions below and the briefing of plaintiffs manifest a significant misunderstanding of the nature of the State’s interest in marriage. This misunderstanding takes two forms. First is the mischaracterization of the State’s interest in marriage as a desire to increase the number of births. Second is the articulation of what the plaintiffs believe should be the state interest – ensuring that children have access to benefits associated with marriage through the adults raising them. The plaintiffs thus hope to convince this Court that either the State has no reasonable grounds on which to justify the distinction between same- and opposite-sex couples inherent in the definition of marriage or that a redefinition of marriage would actually advance the State’s “real” interest. If they are successful on either grounds, they hope this Court will conclude that the marriage law cannot be justified under the requirements

of the Washington Constitution's Privileges and Immunities Clause. For the reasons discussed below, both hopes are unavailing

The misunderstandings inherent in the briefs and decisions below will be addressed in turn.

*First Misunderstanding*

Both plaintiffs and the courts below argue that the only grounds the State offers to justify the statutory definition of marriage is this: that definition encourages a greater number of births. They then easily demolish this "straw man" by pointing out that children are born without marriage and that marriage does not necessarily lead to procreation. If this were really the relevant state interest, they argue, the State would not allow sterile couples to marry and would require fertile couples to have as many children as possible. This argument allows the opponents of the marriage law to avoid rebutting the genuine state interest related to procreation – an interest that provides an eminently reasonable ground for holding that the marriage statute is not in conflict with the Privileges and Immunities Clause.

In fact, rather than a means to increase the number of births, marriage is "society's mechanism for the regulation and amelioration of the consequences of passionate and procreative heterosexual intercourse

(children).” Monte N. Stewart, *Judicial Redefinition of Marriage* 21 CANADIAN JOURNAL OF FAMILY LAW 13, 62 (2004) (available online at [www.marriagelawfoundation.org](http://www.marriagelawfoundation.org) and [www.manwomanmarriage.org](http://www.manwomanmarriage.org)). In other words, since the sexual relationship between men and women consists of compelling passions that often result in children, its effects must be socially channeled into beneficial forms or, more accurately, into a “vital social institution.” *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003).

Another way to state this point is that “[t]he public legal union of a man and a woman is designed . . . to protect the children that their sexual union (and that type of sexual union alone) regularly produces.” Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law* 62 LA. L. REV. 773, 782 (2002). Specifically, marriage ensures that children born to that relationship will have legally enforceable ties to their biological parents and that fathers will have legally enforceable obligations to the mother and the child. The particular vulnerability of children and mothers to the consequences of an “unintended” pregnancy are particularly relevant. As will be discussed below, this vulnerability is different in kind from a situation in which two adults must intend and plan to bring a child into the world with the help of third parties. This amelioration of the

consequences of intercourse between a man and a woman is the genuine state interest that the plaintiffs and the courts below elide when they substitute in “the silly view of marriage as a mechanism mandating procreation.” Stewart, *Judicial Redefinition of Marriage* at 62.

The recent decision of the Indiana Court of Appeals exposes the misunderstanding in the plaintiffs’ characterization of the state interest relative to procreation. The Indiana decision is particularly relevant to this case because that court was called upon to apply Indiana’s Constitutional Privileges and Immunities Clause (IND. CONST., art. I, sec. 23) to a challenge to that state’s marriage law. *Morrison v. Sadler*, 2005 WL 107151 (Ind. Ct. App. 2005). As King County noted in its Reply Brief, this State’s Privileges and Immunities Clause is based on Oregon’s, which is in turn based on Indiana’s. King County Reply Brief at 26.

This recent Indiana decision makes clear that the state interest in ameliorating the consequence of sexual relations between men and women are not similarly implicated by the relationship of a same-sex couple. The Indiana Court of Appeals noted that there is a fundamental difference between the way in which “most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction,” *Morrison v. Sadler*,

2005 WL 107151 (Ind. Ct. App. 2005) at 13-14, and that this difference is fundamental to the rationality of the definition of marriage as the union of a man and a woman.

The Indiana court's *sound* understanding is this: The genuine and relevant state interest is a component of what can be referred to as society's *deep logic of marriage*, a component that the States' briefs in this and other cases generally refer to as "the government's interest in 'furthering the link between procreation and child rearing.'" *Baker v. Vermont*, 744 A.2d 864, 881 (Vt. 1999). The phrase *deep logic of marriage* encompasses the complex of purposes and values that inheres in the social institution of marriage as now experienced in our society. The relevant "procreative" component is a response to two essential realities of man/woman intercourse: its procreative power and its passion. The component's purpose is understood as the provision of adequate private welfare to children. (The phrase *private welfare* includes not just the provision of physical needs such as food, clothing, and shelter; it encompasses opportunities such as education, play, work, and discipline and intangibles such as love, respect, and security.) Man/woman intercourse, as an act of compelling passion often leading to child-bearing, has important implications for society. Societal interests are corroded when child-bearing occurs in a setting of inadequate private welfare and

are advanced when it occurs in a setting of adequate private welfare.

Passion-based procreation militates against the latter and is conducive of the former. That is because passion, not rationality, may well dictate the terms of the encounter.<sup>1</sup> While rationality considers consequences nine months hence and thereafter, passion does not, to society's detriment.

Hence, what is understood to be a fundamental and originating purpose of marriage: to confine procreative passion to a setting, a social institution actually, that will assure, to the largest practical extent, that passion's consequences (children) begin and continue life with adequate private welfare. This purposive component of society's deep logic of marriage can be called the *private welfare purpose*. Although the immediate objects of the protective aspects of the private welfare purpose are the child and the often vulnerable mother, society rationally sees itself as the ultimate beneficiary.

Against this background, what is irrational is most certainly not the societal regulation of marriage as the union of a man and a woman but the conferral of "marital" status on same-sex couples, whose passion is not and simply cannot be procreative. Same-sex couples cannot establish a

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<sup>1</sup> The most recently reported data indicates that "49% of pregnancies in 1994 were unintended." John Santelli, et al., *The Measurement and Meaning of Unintended Pregnancy* 35 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 94 (2003).

relationship with a child without intending to do so and implementing that intent through a very deliberate and time-consuming process. Thus, the State can rationally conclude that the essential private welfare purpose in those circumstances is assured without inclusion of such couples in the social institution of marriage. *Morrison v. Sadler*, 2005 WL 107151 (Ind. Ct. App. 2005) at 14; *see also* Stewart, *Judicial Redefinition of Marriage* at 41-52.

Thus, in taking issue with the other court decisions (such as Vermont, Massachusetts, British Columbia, and Ontario) mandating a redefinition of marriage (on which the plaintiffs and the courts below have relied in this case), the Indiana court quotes from Stewart, *Judicial Redefinition of Marriage* at 47:

[A] central and probably preeminent purpose of the civil institution of marriage (its deep logic) is to regulate the consequences of man/woman intercourse, that is, to assure to the greatest extent practically possible adequate private welfare at child-birth and thereafter. The opinions simply avoid this point when they say that marriage law does not require an intent or ability to procreate in order to marry or actual procreation to stay married; they miss the States' point that marriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences.

*Morrison v. Sadler*, *supra*, 2005 WL 107151 at 25. The court concludes that the quoted article "is fully reflective of our position." *Id.* at 26.

The fact that some man/woman marriages are childless, whether or not by choice, does not defeat the state interest in promoting marriage as the ideal institution to ameliorate the consequences of man/woman intercourse.<sup>2</sup> First, the plaintiffs make an unsound argument when they point to the reality of non-procreative married couples or, more relevant, to the reality that government, when issuing marriage licenses to men and woman, does not inquire into procreative intentions and capacities. Andersen Brief of Respondents at 63; Castle Brief of Respondents at 35. That reality is not at all inconsistent with the reality of society's deep logic of marriage and its private welfare purpose. That is because the absence of governmental inquiry at the time of licensure and thereafter flows from our society's long-standing sensibility against personalized governmental intrusion into marital procreative intentions and capacities. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); Stewart, *Judicial Redefinition of Marriage* at 44-52. Second, in yet another way, legal allowance of non-procreative married couples is fully consistent with society's deep logic of marriage. The marital norm of monogamy (sexual exclusivity) assures that the individuals comprising non-procreative

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<sup>2</sup> This brief will not address man/woman marriage as the optimal child-rearing mode because the Brief of Amicus Curiae Families Northwest does so. That subject is also addressed in Stewart, *Judicial Redefinition of Marriage* at 64-85.

marriages are not – with anyone – procreating outside of the institution of marriage and, in that way, actually furthers society’s private welfare purpose. See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 788 (2002).

Likewise, the reality of same-sex couple adoption in no way is inconsistent with or undermines the rationality of society’s deep logic of marriage, with its private welfare purpose. That is because adoption is not a means of procreation; rather it is a way of placing children who have already been born. Stewart, *Judicial Redefinition of Marriage* at 49.

#### *Second Misunderstanding*

The second misunderstanding of the nature of the State’s interest relative to procreation is closely related to the first. The *Andersen* opinion concedes that “State action to maintain and strengthen the institution of marriage for heterosexual couples is decidedly a means that is rationally related to promoting stable families and is something that is good for children” but concludes that giving marital benefits to same-sex couples would not “injure” that interest. Andersen Memo. Op. at 19.<sup>3</sup> The plaintiffs renew here this argument premised on the reality that some children are being raised by same-sex couples; the same argument was

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<sup>3</sup> This oft-used “no downside” argument is dismantled at Stewart, *Judicial Redefinition of Marriage* at 34-35, 71-85.

made in the Indiana case. *Morrison v. Sadler, supra*, 2005 WL 107151 at 13. The argument is that if marriage were redefined to include same-sex couples, then the State's "real" interest relative to marital procreation would be promoted because children raised by same-sex couples would be the beneficiaries of benefits associated with marriage.

Both the Indiana decision and the scholarly literature make clear the flaws in this argument. The Indiana court understood that the right question for sound constitutional analysis 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." *Id.* at 12. If redefining marriage does not promote the State's interest relative to marital procreation (that is, the interest advanced by the private welfare purpose of man/woman marriage), that state interest alone justifies the law's limitation of marriage to the union of a man and a woman and preserves that limitation against any challenge premised on the Privileges and Immunities Clause.

The Indiana court understood that the state interest relative to procreation was different in kind from the interest in providing certain kinds of benefits to people with children in their homes. The state interest relative to procreation (centered on the private welfare purpose) is

advanced by limiting potentially procreative sexual relations to a social institution that commits the couples engaging in those relations to each other and the resulting children. In the light of that reality, the mere presence of children in a household does not rationally justify making eligible for marriage whoever in the household are the providers of child-care. If it did, given the variety of household arrangements across our society, “marriage” would radically change into an institution far different from what it now is and would play a far different societal (including educative) role than it now does. And as a consequence of that radical transformation, society would literally lose the vital institution that now advances the crucial private welfare purpose of marriage. See Stewart, *Judicial Redefinition of Marriage* at 75-85.

The scholarly literature also recognizes the meaningful difference between the state interest genuinely relevant in this case and the different state endeavor of providing present benefits to children regardless of the marital status of their care-givers. For example, Stewart, *Judicial Redefinition of Marriage* at 66-69 analyzes the tactic of the *Goodridge* plurality in shifting “the asserted State interest from protecting the optimal child-rearing mode (man/woman marriage) to ‘[p]rotecting the welfare of children.’” *Id.* at 67. This shift, of course, “is valid to the extent that protecting the optimal child-rearing mode ... is the same governmental

endeavour as ‘protecting the welfare of children’ ....” But, as the article demonstrates, “the different governmental protective endeavours are just that, different.” *Id.* at 68. “[T]he endeavour to protect [marriage as such] ..., with its institutional focus, looks primarily to improve the private welfare received by future generations, whereas the personalized protective endeavour ... is an exercise in the present provision of public welfare.” *Id.* at 68-69. And to advance the “personalized protective endeavour” by supposedly providing present benefits through the redefinition of marriage is actually to radically transform the very social institution that, in its present form, serves the state interest genuinely relevant in this case and, in so doing, thwart that vital state interest. *See id.* at 75-85.

### *Summary*

The State’s interest in linking marriage and procreation – honestly and fairly stated and not elided or substituted by a straw man or conveniently “transformed” – in and of itself, without reference to the other societal interests uniquely advanced by man/woman marriage, sustains the constitutionality of marriage limited to the union of a man and a woman. That interest is profoundly rational, and limiting the core meaning of the institution of marriage to the union of a man and woman

rationality advances that interest. Indeed, to alter that core meaning as plaintiffs ask is to radically alter the institution itself in a way inimical to the State's compelling interest – or, at least, a thoughtful and prudent legislator could so conclude on the basis of thoroughly rational analysis. *Id.* at 81-85.

### CONCLUSION

For the foregoing reasons, amicus curiae Marriage Law Foundation respectfully requests this Court to reverse the judgement of the courts below.

Respectfully submitted,

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### Certificate of Service

I certify that I mailed a copy of the foregoing Brief *Amicus Curiae* in Support of Appellants to the following counsel of record at the addresses indicated, by first-class postage prepaid, on February 3, 2005:

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