

Nos. 75934-1, 75956-1

SUPREME COURT OF THE STATE OF WASHINGTON

HEATHER ANDERSEN, ET AL., *Plaintiffs-Appellees,*

v.

KING COUNTY, *Defendant-Appellant,*

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

CELIA CASTLE, ET AL., *Plaintiffs-Appellees,*

v.

STATE OF WASHINGTON, *Defendant-Appellant.*

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

**BRIEF *AMICI CURIAE* ON BEHALF OF
GREATER SEATTLE BUSINESS ASSOCIATION AND
INLAND NORTHWEST BUSINESS ALLIANCE**

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I. INTRODUCTION

Pursuant to Washington Rule of Appellate Procedure ("RAP") 10.6, *amici* Greater Seattle Business Association and Inland Northwest Business Alliance submit this brief to assist the Court in its consideration of the important issues presented in this case. As business associations dedicated to supporting and promoting Washington's LGBT business and professional communities, the *amici* have a direct and substantial interest in the outcome of this case, which implicates the ability of Washington's businesses and their employees to perform at their fullest potential in a highly competitive global marketplace.

II. IDENTITY AND INTEREST OF *AMICI*

The *amici* are organizations dedicated to supporting and promoting gay and gay-friendly businesses in the State of Washington.

The Greater Seattle Business Association ("GSBA") is the Lesbian/Gay/Bisexual/Transgender ("LGBT") and Allied Business and Professional Chamber of Commerce serving the greater Seattle community since 1981. The GSBA has more than 950 members comprised of individuals, businesses and organizations. The mission of the GSBA is "combining business development and social action to expand economic opportunities for our members, the LGBT community and those who support us."

The Inland Northwest Business Alliance (“INBA”) is a professional GLBTQ/Allied business organization. The INBA has been serving the Inland Northwest since 1994 and has over 120 members in Spokane, Washington and North Idaho. The mission of the INBA is to create a non-discriminatory environment that fosters, promotes and supports a diverse business community in Spokane.

The *amici* and their members collectively employ thousands of Washingtonians, and count many gay and lesbian employees among their most valued human resources. The business success of the *amici*’s members is directly affected by (1) the ability of their members’ employees to perform at their best; (2) the ability of their members to recruit and retain the best employees in a global market for talent; and (3) the diverse and innovative community in which they are headquartered. All three of these interests are directly and substantially implicated by this case.

First, the ability of the *amici* to perform at the high levels necessary to compete in the global marketplace is directly affected by the performance of its existing employees. Employees perform best when they are valued as individuals and secure in their private lives. Thus, the *amici*’s members embrace diversity and non-discrimination on the basis of sexual orientation in the workplace, and attribute their business success in part to that environment of inclusiveness. Workplace equality is only part of the equation, however. Employees in committed same-sex relationships lack the

legal protections enjoyed by their heterosexual co-workers, and that disparity has a negative impact on the ability of those employees to reach their fullest potential.

Second, the competitiveness of the *amici*'s members is dependent upon their ability to recruit and retain the most talented employees in a highly competitive human resources market. Businesses and governments around the country have recognized that the ability to recruit and retain a talented workforce is critical to economic development today, and that fostering a diverse and tolerant community enhances the ability to do so. The Court's decision in this case will have a direct and immediate impact in this area.

Third, the *amici*'s members depend for their success over the long-term on the vigor of the business environment in the community in which they are headquartered. The economy of the State of Washington depends in part on its reputation as a diverse, tolerant, and innovative community. Ending discrimination in the marriage laws would go far to advance the reality and the reputation of the State of Washington as a community that values and respects diversity, and that enjoys a vibrant economy as a result.

In sum, the Court's decision to affirm or reverse the trial courts' rulings in this case will have a profound effect on the day-to-day lives of the *amici*'s members, their employees, and thus on the ability of those employees to perform to their fullest potential.

Likewise, the Court's decision in this case will have an immediate and significant short-term effect on the reputation of the State of Washington as a community that respects and promotes diversity and equality, and thus on the ability of the *amici*'s members and other Washington businesses to recruit and retain the best talent. Finally, a decision to affirm the trial courts will have a longer-term positive effect on the business environment in the State of Washington, by fostering the type of tolerant and innovative community that is the hallmark of successful economies today.

III. ARGUMENT

The *amici* and their members employ many gay and lesbian individuals, and thus have a direct interest in this case. Ending discrimination in the state's marriage laws will enhance the *amici*'s business performance by enabling employees of the *amici* and their members to reach their fullest potential; it will strengthen Washington's ability to attract the world's best talent, and it will enhance Washington's reputation as a diverse, tolerant and innovative community—the hallmark of successful economies today. In short, the *amici* submit that ending marriage discrimination is not only the right thing to do by employees, but it will also be good for business.

A. Ending Discrimination In Marriage Would Enable Employees To Perform At Their Fullest Potential.

Businesses are most successful when all employees are valued, productive, and able to reach their fullest potential. In part for that reason, the *amici* and their members have taken steps to embrace sexual orientation diversity and non-discrimination in their workplaces, and to offer domestic partnership benefits to their employees in same-sex relationships. In the experience of the *amici* and their members, these efforts have been well-received by employees and have helped those employees to perform at their fullest potential. In other words, they have been good for business.

“Family benefits [are] a way to help relieve employees’ worries so that they [can] concentrate better and be more productive while at work.” Maureen Scully & W.E. Douglas Creed, *Restructured Families: Issues of Equality and Need*, 562 *Annals Am. Acad. Pol. & Soc. Sci.* 47, 53-54 (1999). This is equally true for “traditional” families and “non-traditional” ones. See Liz Winfeld and Susan Spielman, *Straight Talk About Gays In The Workplace*, 107-129, 149-153 (2nd ed. 2001). Kay Ostberg, *Should Domestic Gay Partners Have The Same Benefits As Married Couples?*, *Wash. Times*, Nov. 22, 1999, at 40. (“Employees are more productive in an environment where they know that their families are secure and that their employers respect them.”).

It is a simple fact that gay and lesbian individuals are an integral part of the American workforce today. And despite their continuing exclusion from civil marriage, a great many lesbians and gay men in this country nonetheless live in stable relationships and have created families. As the United States Supreme Court recently noted in a case arising from this state, “[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” *Troxel v. Granville*, 530 U.S. 57, 63, 120 S.Ct. 2054, 2059 (2000). Surveys of self-identified lesbians found that roughly three-quarters were in steady relationships; similar studies of gay men have shown that roughly half were in relationships. Letitia Anne Peplau, *Lesbian and Gay Relationships in Homosexuality: Research Implications for Public Policy* 177, 180 (John C. Gonsiorek & James D. Weinrich eds., 1991). Experts estimate there are between one and five million lesbian mothers in the United States, and between one and three million gay fathers. Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, *Child Development* 63 (1992). With diverse family structures increasingly becoming the norm, employers must meet the needs of individuals in same sex relationships—a significant share of the labor pool—if they are to compete.

Employees of the *amici* and their members who are in same-sex relationships—many of whom have children—face the same

challenges associated with building a life and supporting a family that opposite-sex couples experience. And yet, same-sex couples do not have access to the rights and protections afforded married couples. This creates additional burdens and stresses on employees in same-sex relationships, which understandably and necessarily decrease their effectiveness and productivity in the workplace.¹

In part for these reasons, the *amici*'s members have attempted to assist their employees in same-sex relationships and their families by taking a number of steps, including implementing non-discrimination policies, providing benefits to the domestic partners and families of their employees, and offering diversity training that covers sexual orientation. Based on experience, the *amici* and their members believe that extending benefits to all employees without discriminating based on the gender of the employees' partners, or on the basis of sexual orientation generally, improves overall company

¹ This is not a dilemma unique to the *amici* and their employees, but is prevalent across the state in workplaces of all sizes. According to data reported in the 2000 census, approximately 16,000 same-sex couples reside in Washington. See Debbie Cafazzo, *Gay Couples Up In Last Count Of Millennium*, The Tacoma News Tribune (July 11, 2001). Indeed, Washington has the third highest concentration of same-sex couples in the country. See Gary J. Gates & Jason Ost, *The Gay and Lesbian Atlas* (Urban Inst. 2004) (measuring same-sex couples as a proportion of all couples in the state). Undoubtedly, countless employers in the State of Washington-whether they are aware of it or not-employ gay and lesbian employees in committed relationships. See also D'Vera Cohn, *Census Shows Big Increase In Gay Households*, The Washington Post (June 20, 2001) (Researchers believe only one-third of gay couples sharing a household identified themselves as such in the 2000 census).

productivity and competitiveness because their employees will feel supported, will be motivated, and will produce higher quality work. When employers extend benefits on an equal basis, they convey respect and concern for groups of employees who previously have been ignored and marginalized. Doing so engenders significant loyalty not only on the part of those employees, but also on the part of other employees who appreciate this expression of concern for employee welfare and diversity. As a representative of Ford Motors recently said:

Our [human resources] people told us this would favorably impact recruiting, not necessarily for gay and lesbian employees but because new employees in general – and younger people in particular – want to work in an open, fair and inclusive atmosphere.

Helen Lippman, “*Partner Benefits Go Mainstream*,” *Business & Health* (September 1, 2000) at 51; *see also* discussion *infra* at Section III.B (addressing ability of employers to attract the best and brightest employees).

In the experience of the *amici* and their members, providing benefits to gay employees and their families has been a sound business practice. *See* Jim Williams, *Looking To Eliminate Need To Hide Sexual Orientation*, 212 *New York Law Journal* 84 (October 31, 1994) (“Lesbian and gay workers who do not fear adverse employment consequences because of their sexual orientation are less anxious and therefore happier and more

productive employees.”); Amy Joyce, “*Out*” *At Work*, The Washington Post (August 29, 2004) (“[E]mployees say they’re seeing a change in attitude and acceptance that helps them, as gay employees, work to their fullest potential, not having to hide their private lives.”).²

Yet, despite the best efforts of individual employers, ending workplace discrimination and extending benefits to employees in same-sex relationships is only part of the equation. But, domestic partnership benefits do not equal the legal protections that marriage affords families. There are numerous rights, benefits, and obligations that depend upon the state’s recognition of civil marriage. Ending discrimination in the State’s marriage laws would go a step further toward equality for all employees, which would make employees more secure and more effective in their jobs.³ In

² In fact, not only do those efforts make the *amici*’s members more competitive by enhancing employee productivity, they often are attractive to customers and potential business partners as well. Moreover, many potential business partners and customers—including many local governments—now *require* companies entering into contracts with them to offer domestic partnership benefits. *See, e.g.*, Roseanne White Geisel, *Responding To Changing Ideas Of Family*, HR Magazine (August 1, 2004) (Noting that the State of California, local governments such as Minneapolis, Los Angeles, San Francisco, San Mateo County, California, and Tumwater, Washington have ordinances “stipulating that localities will not do business over a certain dollar value with any contractor that doesn’t offer benefits to domestic partners equal to those offered to married employees.”). The *amici* expect this trend to continue.

³ Indeed, more employees would doubtless be affected by eliminating discrimination in the state’s marriage laws than are currently receiving domestic partnership benefits. Because the receipt of such benefits is deemed under the federal tax laws to create taxable income to the employee, many employees choose not to accept them—relying

(Footnote Continued)

addition to being the fair and equitable thing to do for employees in the State of Washington, the *amici* submit that doing so will be good for Washington businesses as well.

B. Ending Discrimination In Washington's Marriage Laws Would Enhance The Ability Of The *Amici's* Members To Recruit And Retain The Most Talented Employees.

The *amici* have also found that employers' attempts to create workplace equality for gay and lesbian employees have had a positive effect on their ability to recruit and retain the best and brightest candidates. In a highly competitive global market for talented employees, an inclusive corporate culture and the availability of domestic partner benefits can be important factors in recruiting new employees. Similarly, a demonstrated commitment to diversity and non-discrimination engenders loyalty and commitment from existing employees—better enabling the *amici's* members to retain talented employees who might receive offers to go elsewhere.

It is well-recognized among companies, and human resources professionals in particular, that competition for top talent is strong

instead on a partner's separate health benefits, and depending on the availability of domestic partnership benefits from their own employer as a safety net. *See, e.g., Gays and Lesbians Claim Partner Benefits Less Than Expected*, The Seattle Times (January 10, 2001) (noting that employees of the State of Washington have a low rate of utilization, with fewer than one-half of one percent of state employees who receive insurance benefits participating in the state's domestic partner plan).

and is inexorably affected by geography. Last year, for example, Novell, Inc. moved its headquarters from Provo, Utah to Waltham, Massachusetts in part because most of its executives were—and wished to remain—based in Massachusetts. See Bob Mims, *Novell Moves HQ To The East*, The Salt Lake Tribune (January 29, 2004); Lisa Carricaburu, *Utah Slowly Slips Off Map Of Tech Hubs*, The Salt Lake Tribune (February 8, 2004).

In addition to geography, the perceived inclusiveness of work environments likewise affects the ability to recruit and retain talented employees. See Michael T. Burr, *Nearly Half Of Fortune 500 Companies Offer Benefits For Employees' Domestic Partners*, Corporate Legal Times (July 2004) (quoting a Minnesota executive from Imation Corp.: “If you are trying to attract the best employees, you need a work environment where everyone feels that they are valued and treated equally.”); Geisel, *supra* (“In spite of controversy[,] companies have added domestic partner coverage because they want to offer equitable benefits across their employee base, to support diversity in the workplace, and to recruit and retain talented employees.”). Changes in society at large have thus altered notions of what is good for business: “[A]s benefits became common in high-tech companies, in airlines and other industries, a debate once considered social and political began to develop an economic tone.” Bill Schackner, *Same-Sex Deals An Issue In Recruiting Top Talent To Universities* (May 29, 2000); Mary Landers, *Beneficial*

Relationships, Savannah Morning News (November 4, 2000) (“In a tight job market, [domestic partner benefits] mean the difference between having workers and looking for them.”).

The geography of employee recruitment and retention is directly implicated by the debate over marriage equality. This was starkly highlighted last year when voters in Ohio were considering an amendment to that state’s constitution (“Issue 1”) that would ban same-sex marriage as well as domestic partnership benefits offered by state and local government entities. Ohio Governor Bob Taft (R) actively campaigned against the measure, noting that many companies, “including the high-tech companies the state is trying to foster, rely on domestic partnership benefits to attract talented workers.” Taft, *Others speak out against Issue 1*, Columbus Business Journal, October 14, 2004. Major Ohio employers such as Procter & Gamble and Federated Department Stores likewise campaigned against the amendment, fearing the effect its passage would have on the ability to recruit and retain employees to Ohio. *Id.* The AFL-CIO and Nationwide Mutual Insurance Co. issued a joint statement urging rejection of the amendment because it would “hurt job creation efforts in the state.” *Id.*

While the Ohio debate focused on the availability of domestic partner benefits, the wider issue of the ban on marriages of same-sex couples likewise implicated employee recruitment and retention. Ohio employers openly worried that banning marriage would deter

talented employees (straight and gay) from accepting employment with Ohio companies, universities, and government organizations. *Id.*

The reputation of the State of Washington as a tolerant and inclusive environment is likewise at stake in this case. In the same way that the availability of domestic partnership benefits has evolved in recent years into a significant recruitment factor for businesses, the *amici* believe that the Court's ruling in this case will set a tone that will affect the ability of Washington companies to attract and retain the best talent to this state in the future. Affirming the trial courts' rulings will send a message of tolerance to talented employees—gay and straight alike—who may consider relocating to Washington; reversal may have quite the opposite effect.

C. Affirming The Trial Courts' Decisions Would Reinforce Washington's Reputation As A Diverse And Tolerant Community—A Factor That Fuels The Success Of Its Economy.

In addition to the micro-level impact this case will have on the ability of individual businesses to attract talented employees to Washington, this case likewise implicates the broader, long-term vitality of the economy of the State. The business success the *amici*'s members have experienced in fostering diverse and inclusive business environments is substantiated by research showing that on a broader scale, communities that embrace diversity and non-discrimination—particularly with respect to sexual orientation—are

likewise the most innovative and successful business environments in the country.

People are the essential element of business capital driving today's economy, and thus the ability to attract highly qualified human capital—i.e. employees—is one of the most important indicators of business success. Just as manufacturers and industrialists earlier in history located their factories near the resources they forged into products, today's businesses tend to be located in proximity to talented pools of employees. Richard Florida, *The Rise Of The Creative Class*, 60-62 (2002). Nobel prize-winning economist Robert Lucas has shown that the driving forces in the growth and development of cities and regions lie in the productivity gains associated with the clustering of talented people or human capital. Robert Lucas, Jr., *On the Mechanics Of Economic Development*, 22 *Journal of Monetary Economics* at 38-39 (1988).

Correspondingly, research shows that talented people themselves are drawn to regions and metropolitan areas that exhibit high levels of tolerance for diversity—particularly with respect to sexual orientation. R. Florida, 79, 249-50. Research on economic development has shown, for example, that tolerance for diversity in sexual orientation and the presence of large and vibrant gay communities, is the most positively and significantly associated factor in determining the presence of high-tech industry. *Id.* at 254-

58.⁴ The experience of city leaders across the country substantiates these findings. As the economy has changed in recent years, cities and states across the country have seen what some have termed a “brain drain,” with highly educated individuals flocking to certain cities and leaving others. See Blaine Harden, *The Few, The Chosen, The Brain Gain Cities*, *The Washington Post* (November 16, 2003) (noting that certain areas, including Seattle, are “racing away from everybody else in terms of their ability to attract and retain an educated workforce.”) Cities that have been successful in attracting an educated workforce are “diverse, tolerant and rich with the cultural amenities that help them steal still more talent.” And, as the research above shows, “[t]hese cities tend to have . . . large and visible gay communities.”

And yet, the economic development benefits of a tolerant community are not limited to large cities like Seattle. In Richard Florida’s study, for example, smaller Washington cities like Spokane and Bellingham likewise rank among the most tolerant communities studied. *Id.*, App. B. This tolerance factor, Florida notes, suggests

⁴ Florida is quick to point out that his study does *not* suggest a high level of correlation between being gay and working in the high-tech industry. Rather, workers in high-tech industry are drawn to places that are open and tolerant. It is that openness and tolerance that correlates directly to the presence of gay communities. Florida, *supra* at 258. Likewise, Florida points out that this correlation is not artificially skewed by consideration of the San Francisco area, with its strong tech industry and large gay community. The correlation is equally strong even when San Francisco is eliminated from statistical consideration. *Id.*

“low entry barriers for people,” meaning that gays, immigrants, and other minority groups may be “accepted quickly into all sorts of social and economic arrangements.” *Id.* at 250. This has a positive economic result, particularly in an economy increasingly based on information and technology, Florida concludes. “There is much to gain economically from being an open, inclusive and diverse community.” *Id.* at 266.

For these reasons, the debate over marriage equality is important to businesses and the economy. The campaign against marriage for same-sex couples in Ohio—a state well-acknowledged to be suffering from an outflow of talented employees⁵—is illustrative of why this issue is important to the business community. The campaign against the marriage ban in Ohio was joined by government officials, chamber of commerce leaders, labor unions, and major Ohio corporations. *See, e.g.,* Catherine Candisky, *Same-Sex Marriage Ban May Lead To Ripples, Some Say*, *The Columbus Dispatch* (September 24, 2004) (“Columbus Mayor Michael B. Coleman said the proposal would strip numerous rights from unmarried couples and hurt Ohio’s ailing economy.”). All recognized that the harm such a measure would cause to the business community in Ohio, to the reputation of that state as an attractive place to work, would be substantial:

⁵ *See* Harden, *supra* (“Cleveland desperately needs entrepreneurs,” but loses them to cities like Seattle, Boston, and Minneapolis).

Columbus business owner Cheryl McClellan, a Republican, said she fears that the [same-sex marriage ban] proposal will make it harder to recruit employees. "I have serious reservations that we will be able to attract and retain the workers we need to turn this economy around," said McClellan, owner of Efficio LLC, a Columbus marketing firm focused on high-tech companies . . . The proposal "repels talent from our state, our small businesses," said [Thomas Grote], president of Goldenlight Consultants. "The last thing we want to do is to discourage people from coming to Ohio.

Candisky, *supra*.

Those concerns were echoed by the president of Ohio State University, who issued a statement saying that the marriage ban "would have an adverse impact on the efforts of Ohio State, one of Ohio's largest employers, to attract and retain employees." Letter to Governor Taft from Karen Holbrook, President of The Ohio State University (February 2, 2004) (*see* http://president.osu.edu/taft_letter.htm). Fears of a "brain drain" from Ohio on the part of community leaders were substantiated by gay professionals themselves:

It's hard not to find gay professional couples who are thinking of packing their bags . . . Bob Barnes, an assistant vice president at Huntington National Bank, lives with Ryan Poirier, who is working on his PhD in education at Ohio State University. "If Ohio did become a hate state and there was a state that said we'll welcome you, after Ryan finishes his PhD, I will take my MBA and we'll go," he says.

Michelle Goldberg, *'Homosexuals Are Hellbound'*, Salon (October 18, 2004). In fact, despite the efforts of Ohio leaders, Issue 1 passed in the November general election.

The experience of the *amici*'s members as Washington employers confirms the academic and anecdotal evidence showing that diverse, tolerant, and inclusive communities are more successful business environments. The *amici* view the decisions of Judges Downing and Hicks as expressions of a strong tolerance for diversity, equality, and personal liberty in the State of Washington, which has enabled companies such as the *amici*'s members to thrive in the presence of a highly talented workforce. Affirming those decisions will have a positive long-term effect on the business environment in the State of Washington, by reinforcing that culture of tolerance and inclusiveness and maintaining Washington's attractiveness as a place to live.

IV. CONCLUSION

The *amici* laud the decisions of the King and Thurston County Superior Courts as expressions of respect for the values of equality, diversity, and tolerance that have made Washington an attractive place to live and an innovative environment for business. Out of respect for all Washington citizens, including many gay and lesbian employees, the *amici* urge the Court to affirm those decisions. In addition to being the just result for employees, such a result will enable the *amici* and all members of Washington's

business community to thrive in an environment that attracts and values the best and brightest employees from across the country. For all of these reasons, and for the additional and perhaps most important reason that ending discrimination is the right thing to do, we urge the Court to affirm the decisions of the trial courts.

Dated: February 4, 2005 Respectfully Submitted,

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