

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

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

v.

STATE OF WASHINGTON, *Defendant-Appellant.*

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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Attorneys for *Amici Curiae* History Scholars

I. STATEMENT OF RELIEF SOUGHT

Pursuant to Washington Rules of Appellate Procedure 10.6 and 13.46, the undersigned respectfully request leave to file the Brief *Amici Curiae* of History Scholars, submitted herewith. The history scholars believe that their brief will assist this Court in its consideration of the important issues presented in this case by providing the necessary historical context.

II. IDENTITY AND INTEREST OF *AMICI*

The *amici* are history scholars at various colleges and universities who have studied and written extensively on the history of marriage, families, gender, and the law in the United States.¹ The research and scholarship of the *amici* thus go to the heart of the issues presented in this case—particularly in light of the Appellants’ and Intervenors’ arguments regarding what they call a “traditional” or “historic” definition of marriage, which they suggest has been “undisturbed” through Washington’s history. *See, e.g.*, Brief of Appellant King County at 1; Brief of Appellant State of Washington at 18 (asserting that the “traditional[]” definition of marriage is set forth in an 1882 treatise); Brief of Intervenors at 49. The *amici* have an interest in correcting such mischaracterizations, and in

¹ The names, institutional affiliations, and brief biographies of the *amici* are set forth at Appendix A to this Motion.

providing an accurate historical record against which the Court may measure the Appellants' and Intervenors' arguments.

III. *AMICIS* FAMILIARITY WITH THE ISSUES AND ARGUMENTS

Counsel for the *amici* has reviewed the decisions of the trial courts in this matter, the parties' and intervenors' briefs before the trial courts, the parties' and intervenors' briefs submitted to this Court, and is familiar with the arguments presented. The *amici* have avoided repetition of arguments made by the parties and intervenors.

IV. ISSUES TO BE ADDRESSED IN BRIEF *AMICI CURIAE* OF HISTORY SCHOLARS

The attached Memorandum addresses the following issues:

First, Appellants' and Intervenors' characterization of marriage as a static tradition, "undisturbed" since the days of Washington Territory is historically inaccurate;

Second, marriage in Washington is, and has always been, a civil institution, bounded by the constitution and guided by societal conditions; and

Third, marriage has always been an evolving institution, and has undergone many fundamental changes—many of which were viewed as "radical" at the time they occurred—that have enabled marriage to maintain its importance and relevance to modern society.

V. WHY THE *AMICI* BRIEF WILL ASSIST THE COURT

The *amici* agree with Appellant King County that “[t]he context for the legal issues in this case is best provided by a review of the history of the law regarding marriage in Washington and other jurisdictions.” Brief of Appellant King County at 4. But as scholars specializing in the history of marriage, families, gender, and the law, the *amici* note that the Appellants and Intervenors have mischaracterized that history. Appellants and Intervenors, in their briefs, make a variety of arguments based upon what they call a “traditional” definition of marriage, which they assert has existed “undisturbed” since Washington’s territorial days. They characterize the restriction of marriage to individuals of the opposite sex as “inherent,” “historic,” and “intrinsic” to the definition of marriage. Brief of Appellant State of Washington at 39; Brief of Intervenors at 49.

In fact, there has never been a fixed “traditional” definition of marriage, and many changes to the legal terms of marriage have involved features of marriage that were once considered “intrinsic” to the institution. The *amici* wish to submit their brief to show that references to a “traditional” definition of marriage is artificial and historically inaccurate, and to show that marriage has been a constantly evolving institution throughout Washington’s history. The *amici* will show that evolution of the terms of marriage—even when it involved changes that some considered “radical” or

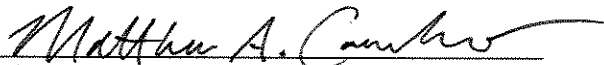
“unnatural”—has enabled marriage to maintain its importance and relevance to modern society. The *amici* believe their brief will provide this necessary historical context to the Court’s consideration of this case.

VI. CONCLUSION

For the foregoing reasons, the undersigned history scholars respectfully request this Court’s permission to file the Brief *Amicus Curiae* of History Scholars, submitted to the Court herewith.

Dated: February 7, 2005

HELLER EHRMAN WHITE & MCAULIFFE LLP

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APPENDIX A

Peter W. Bardaglio is Professor of History at Ithaca College. He is the author of *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*, (University of North Carolina Press 1995), which won the 1996 James Rawley Prize from the Organization of American Historians for best book published on the history of race relations in the United States.

Norma Basch is a professor of history at Rutgers University. She has written extensively on marriage and domestic relations in 19th Century American law, including *Framing American Divorce: From the Revolutionary Generation to the Victorians* (University of California Press 1999). She teaches courses on gender history, women's history, and American legal history in both the undergraduate and doctoral programs at Rutgers.

George Chauncey is Professor of History at the University of Chicago. He is the author of *Why Marriage? The History Shaping Today's Debate over Gay Equality* (Basic Books 2004) and *Gay New York: Gender, Urban Culture, and the Making of the Gay Male*

World, 1890-1940 (Basic Books 1994), which won the Organization of American Historians' Merle Curti Award for the best book in social history and Frederick Jackson Turner Award for the best first book in any field of history, as well as the Los Angeles Times Book Prize and Lambda Literary Award. He is also the author of numerous articles and the coeditor of three books and special journal issues on the history of gender and sexuality in the United States.

Stephanie Coontz is a Faculty Member in History at The Evergreen State College, where she teaches courses in history and family studies. She is the author of the forthcoming *Marriage: A History* (Viking-Penguin May 2005), as well as *The Way We Never Were: American Families and the Nostalgia Trap* (rev. ed. Basic Books 2000), *The Way We Really Are: Coming to Terms with America's Changing Families*, (Basic Books 1997), and *The Social Origins of Private Life: A History of American Families* (Verso, 1988).

Nancy F. Cott is the Jonathan Trumbull Professor of American History at Harvard University and the Pforzheimer

Foundation Director of the Schlesinger Library on the History of Women in America at the Radcliffe Institute for Advanced Study. Her research and teaching concentrate on the history of women and of gender relations in the United States. Her interests have ranged from domesticity and feminism to the role of gender in political institutions and citizenship. She is the author or editor of seven books, the most recent of which is *Public Vows: A History of Marriage and the Nation* (Harvard University Press 2000).

Peggy Cooper Davis is the John S. R. Shad Professor of Lawyering and Ethics at New York University School of Law. She is a former family court judge and has published widely on family and child welfare issues. She is the author of *Neglected Stories: The Constitution and Family Values* (New York: Hill and Wang 1997), on the constitutional position of the family.

John D'Emilio is a professor of history and of gender and women's studies at the University of Illinois at Chicago. He received his Ph.D. in history from Columbia University in 1982. He is the author or editor of half a dozen books including *Sexual*

Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (University of Chicago Press 1983), *Intimate Matters: A History of Sexuality in America* (University of Chicago Press 1998) (1988) (with Estelle Freedman), and *Creating Change: Sexuality, Public Policy, and Civil Rights* (St. Martin's Press 2000). His awards and honors include fellowships and grants from the National Endowment for the Humanities, the Guggenheim Foundation, the Center for Advanced Studies in the Behavioral Sciences, the Humanities Research Centre of Australian National University, the John F. Kennedy Presidential Library and the Lyndon B. Johnson Presidential Library. His biography of the civil rights leader, *Bayard Rustin, Lost Prophet: The Life and Times of Bayard Rustin* (Free Press 2003), was a finalist for the National Book Award in 2003.

Nancy E. Dowd is Chesterfield Smith Professor of Law at the University of Florida Levin College of Law, where she teaches in the areas of family law, constitutional law, and gender and the law. She is the author of many articles in the area of family law and two books, *Redefining Fatherhood* (New York University Press 2001)

and *In Defense of Single Parent Families* (New York University Press 1997).

Ariela Dubler is Associate Professor of Law at Columbia Law School, where she teaches legal history and family law. Her research and writing focus on the history of marriage and nonmarital relations. She is the author of *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, Yale Law Journal (2003); and *Wifely Behavior: A Legal History of Acting Married*, Columbia Law Review (2000).

Estelle B. Freedman is the Edgar E. Robinson Professor in U.S. History at Stanford University. Her books include *No Turning Back: The History of Feminism and the Future of Women* (New York: Ballantine Books 2002) and *Intimate Matters: A History of Sexuality in America* (rev. ed. University of Chicago Press 1997).

Linda Gordon is Professor of History at New York University and Vilas Distinguished Research Professor Emeritus at the University of Wisconsin. She is the author of three books and the editor of two books on the history of social policies regarding

work, family, and gender. Her most recent book, *The Great Arizona Orphan Abduction* (Harvard University Press 1999), won the Bancroft Prize for best book on United States history and the Beveridge Prize for best book on the history of the Americas.

Robert W. Gordon is Chancellor Kent Professor of Law and Professor of History at Yale University. He teaches courses on American Legal History and has written extensively on the history of law regulating relationships in the household and workplace.

Michael Grossberg is Professor of History and Law at Indiana University, Bloomington, and Editor of the *American Historical Review*. His research focuses on the relationship between law and social change, particularly the intersection of law and the family. He has written a number of books and articles on legal and social history. His 1985 book, *Governing the Hearth, Law and the Family in Nineteenth-Century America* (University of North Carolina Press 1983) won the Littleton-Griswold Prize in the History of Law and Society in America given by the American Historical Association. He also served as a consultant on *Studies in Scarlet*:

Marriage and Sexuality in the United States and the United Kingdom, 1815-1914, a digital collection of legal materials produced by the Research Libraries Group.

Hendrik Hartog is the Class of 1921 Bicentennial Professor of the History of American Law and Liberty at Princeton University. He is the author of *Man and Wife in America: A History* (Harvard University Press 2000) and other works on the legal history of marriage and the family.

Martha Hodes is Associate Professor of History at New York University and author of *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (Yale University Press 1997), winner of the Allan Nevins Prize of the Society of American Historians. She is also the editor of *Sex, Love, Race: Crossing Boundaries in North American History* (New York University Press 1999).

Nancy Isenberg is the Mary Frances Barnard Chair in Nineteenth Century American History at the University of Tulsa. She has written and edited books and published many articles on

legal and gender issues. Her book *Sex and Citizenship in Antebellum America* (University of North Carolina Press 1998) was awarded the 1999 book prize from the Society for Historians of the Early Republic.

Linda K. Kerber is May Brodbeck Professor in the Liberal Arts and Professor of History at the University of Iowa. She also holds an appointment as Lecturer in Law at the University of Iowa College of Law. Her most recent book, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (Hill and Wang 1998), won the Littleton-Griswold Prize of the American Historical Association for the best book in U.S. Legal History. She is a Fellow of the American Academy of Arts and Sciences.

Elaine Tyler May is Professor of American Studies and History at the University of Minnesota. She has served recently as President of the American Studies Association and as the Distinguished Fulbright Chair in American History at University College, Dublin, Ireland. She has published several books and articles on marriage and divorce, the Cold War era, women and

family in the United States, the history of sexuality and reproduction, and the relationship between private life, politics, and public policy. Those titles include *Barren In The Promised Land: Childless Americans And The Pursuit of Happiness* (Harvard University Press 1995); *Homeward Bound: American Families In The Cold War Era* (Basic Books 1988); and *Great Expectations: Marriage And Divorce In Post-Victorian America* (University of Chicago Press 1983).

Linda McClain is Professor of Law at Hofstra University School of Law. She is a former Faculty Fellow in Ethics at the Harvard University Center for Ethics and the Professions. She teaches and writes in the areas of family law, jurisprudence, property, and welfare law.

Martha Minow is William Henry Bloomberg Professor of Law at Harvard Law School, where she teaches family law and other courses. She is the co-editor of a casebook on women and the law, the author of numerous articles and book chapters on the history of family law, and a supervisor of numerous doctoral and masters

degree students working family law and its history in the United States and elsewhere.

Steven Mintz is John and Rebecca Mores Professor of History at the University of Houston and a member of the board of directors of the Council on Contemporary Families. His books include *Domestic Revolutions: A Social History of American Family Life* (Free Press 1989) and *Moralists And Modernizers: America's Pre-Civil War Reformers* (The Johns Hopkins University Press 1995).

Peggy Pascoe is Associate Professor and Beekman Chair of Northwest and Pacific History at the University of Oregon, where she is completing a book on the history of miscegenation law in the United States from 1860 to 1967. Among the articles she has written on the topic of marriage law is *Miscegenation Law, Court Cases, and Ideologies of 'Race' In Twentieth-Century America*, *Journal of American History*, June 1996.

Carole Shammas is the John R. Hubbard Chair in History at the University of Southern California. She has published numerous

articles in history and legal history journals concerning family law, and is the author of *A History of Household Government in America* (University of Virginia Press 2002).

Mary Lyndon (Molly) Shanley is Professor of Political Science and the Margaret Stiles Halleck Chair at Vassar College. She is the author of *Feminism, Marriage and the Law in Victorian England* (Princeton University Press 1993); *Making Babies, Making Families: What Matters Most In an Age of Reproductive Technologies, Surrogacy, Same Sex and Unwed Parents* (Beacon Press 2001), concerning ethical issues in contemporary family law; and two anthologies on political theory. She teaches courses in the history of political philosophy and contemporary political and feminist theory. She has served as Chair of the American Political Science Association's Committee on the Status of Women, and as President of the Women's Law Caucus for Political Science.

Reva Siegel is Nicholas deB. Katzenbach Professor of Law at the Yale Law School. Professor Siegel writes in the fields of

constitutional law, antidiscrimination law, and legal history, with special focus on questions of gender and the institution of marriage.

Amy Dru Stanley is Associate Professor of History at the University of Chicago. A historian of 19th Century American history, she has written extensively on law, marriage, gender, and the household. She is the author of *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation* (Cambridge University Press 1998), which won several awards, including the Frederick Jackson Turner Award for the best first book in American History.

Sandra VanBurkleo is Associate Professor of History and Adjunct Professor of Law at Wayne State University. She has written numerous articles on American constitutional and legal history, and is the author of *'Belonging to the World': Women's Rights and American Constitutional Culture* (Oxford University Press 2001).