

NO. 69655-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS NO 22616-2-II

FRANK VASQUEZ, Respondent and Petitioner,

v.

JOSEPH HAWTHORNE, as personal
representative of the estate of
Robert Awrey Schwerzler, Appellant and Respondent.

**SUPPLEMENTAL
AMICI CURIAE MEMORANDUM OF
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, ET AL.,
IN SUPPORT OF PETITIONER VASQUEZ**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	iii
I. SUMMARY OF THE ARGUMENT	1
II. STATEMENT OF INTERESTS OF AMICI CURIAE	4
III. STATEMENT OF THE CASE	4
IV. AUTHORITY AND ARGUMENT	4
A. Lesbians and Gay Men Should Not Be Denied Access to Meretricious Relationship Equity Because Same- Sex Partnerships Are Not Distinguishable In Any Pertinent Respect From Different-Sex Partnerships	4
B. Because The Established Common Law Doctrine Values Shared Intent To Acquire And Hold Property Jointly, And Exists To Promote Fairness, Gay People In General Should Have Even Stronger Equitable Claims Than Heterosexuals, Due To The Burdens Anti-Gay Hostility Can Place On Gay Couples’ Freedom To Plan And Secure Their Intentions	6
C. Washington’s Marriage Laws, And Arguments Pertaining To Them, Do Not Support A Different- Sex-Only Limitation On Meretricious Relationship Equity	10
1. The meretricious relationship doctrine is “wholly unrelated” to marriage, and importing the rules of marriage into this area of equity would be illogical	10
2. The relief Mr. Vasquez seeks is fully consistent with relevant Washington law and policy	11

3.	Arguments about procreation have no relation to meretricious relationship property disputes	13
D.	Were This Court To Approve The Categorical Limitation Sought To Be Imposed Below, Significant Constitutional Problems That Should Be Avoided, Would Be Presented	13
V.	CONCLUSION	16
	APPENDIX A	18

TABLE OF AUTHORITIES

WASHINGTON CASES

	<u>Page</u>
<u>Connell v. Francisco</u> , 127 Wn.2d 339, 898 P.2d 831 (1995)	2, 4, 6, 10
<u>Heinsma v. City of Vancouver</u> , Case No. 99-2-00772-1 (Clark Cty. Sup. Ct. June 26, 2000)	11
<u>In re Estate of Lindsey</u> , 101 Wn.2d 299, 678 P.2d 328 (1984)	2, 6, 10
<u>In re Marriage of Cabalquinto</u> , 100 Wn.2d 325, 669 P.2d 886 (1983)	12
<u>In re Marriage of Pennington</u> , 14 P.3d 764, 2000 Wash. LEXIS 915 (2000)	1, 4, 10, 15
<u>Singer v. Hara</u> , 11 Wn.App. 243, 522 P.2d 1187 (1974)	15
<u>Wicklund v. Wicklund</u> , 84 Wn.App.763, 932 P.2d 652 (1996)	12

OTHER STATE CASES

<u>Baehr v. Lewin</u> , 74 Haw. 645, 852 P.2d 44 (1993)	15
<u>Baker v. Vermont</u> , 744 A.2d 864 (Vt. 1999)	15
<u>Gryczan v. State</u> , 283 Mont. 433, 942 P.2d 112 (1997)	15
<u>Lawrence and Garner v. Texas</u> , No. 14-99-00109-CR, 2000 Tex.App. LEXIS 3760 (2000)	15

<u>Tanner v. Oregon Health Sciences University,</u> 157 Or.App. 502, 971 P.2d 435 (1998)	15
---	----

FEDERAL CASES

<u>Nabozny v. Podlesney,</u> 92 F.3d 446 (7 th Cir.1996)	14
--	----

<u>Quinn v. Nassau County Police Dept.,</u> 53 F.Supp.2d 347 (E.D.N.Y. 1999)	14
---	----

<u>Romer v. Evans,</u> 517 U.S. 620, 116 S. Ct. 1620, 134 L Ed.2d 855 (1996)	14, 16
---	--------

<u>Rowland v. Mad River Local Sch. Dist.,</u> 470 U.S. 1009, 84 L.Ed.2d 390, 105 S.Ct. 1371 (1985)	7
---	---

<u>Stemler v. City of Florence,</u> 126 F.3d 856 (6 th Cir. 1997)	14
---	----

<u>Tester v. City of New York,</u> No. 95 Civ. 7972, 1997 U.S. Dist. LEXIS 1937 (S.D.N.Y. Feb. 25, 1997)	14
--	----

SECONDARY SOURCES

Marcy Adelman, <u>Stigma, Gay Lifestyles, and Adjustment to Aging: A Study of Later-Life Gay Men and Lesbians,</u> 20 J. Homosexuality 7 (1991)	9
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<u>Benefits for Gay Partners Rids State of a Catch-22,</u> Seattle Post-Intelligencer, May 26, 2000, at A18	12
---	----

Raymond Berger, <u>Research on Older Gay Men: What We Know, What We Need to Know, in Lesbian and Gay Lifestyles: A Guide for Counseling and Education</u> 217 (Woodman, ed., 1992)	9
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Raymond Berger, <u>The Older Homosexual Man in Perspective, in Gay and Gray: The Older Homosexual Man</u> 186 (Berger, ed., 1982)	9
--	---

Phillip Blumstein & Pepper Schwartz, <u>American Couples</u> (1983)	5
Bryant & Demian, <u>Relationship Characteristics of American Gay and Lesbian Couples: Findings from a National Study</u> , 1 J. Gay & Lesbian Soc. Sci. 101 (1994)	5
Lora Connolly, <u>Long-Term Care and Hospice: The Special Needs of Older Gay Men and Lesbians</u> , in <u>Health Care for Lesbians and Gay Men: Confronting Homophobia and Heterosexism</u> 77 (Peterson, ed., 1996)	10
Richard Friend, <u>Older Lesbian and Gay People: A Theory of Successful Aging</u> , 20 J. Homosexuality 99 (1990)	9
John C. Gonsiorek, <u>Threat, Stress, and Adjustment: Mental Health and the Workplace for Gay and Lesbian Individuals in Homosexual Issues in the Workplace</u> 243	8
Arnold H. Grossman, <u>At Risk, Infected, and Invisible: Older Gay Men and HIV/AIDS</u> , 6 J. of Ass’n of Nurses in AIDS Care, 13 (1995)	9
M. Hequet, <u>Out at Work: Homosexuality in the Workplace</u> , 32 Training 53 (1995)	8
Gregory M. Herek, <u>Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy</u> , 44 Am. Psychologist 948 (1989)	7
Linda Keene, “Hate Crimes On Rise In NW – Homosexuals, Racial Minorities Are Targets,” The Seattle Times, p. B1, June 8, 1990	7
Lawrence A. Kurdek, <u>Lesbian and Gay Couples, in Lesbian, Gay and Bisexual Identities Over the Lifespan</u> 243 (D’Augelli & Peterson, eds., 1995)	5
Barbara Laker, “Attacks on Homosexuals Spur ‘Hate-Crime’ Conference,” Seattle Post-Intelligencer, p. C7, Jan. 25, 1990	7

Lambda Legal Defense and Education Fund, Inc., Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation (10/25/1999) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217> 8

Lambda Legal Defense and Education Fund, States and Municipalities Offering Domestic Partnership Benefits and Registries (1999) <<http://www.lambdalegal.org/cgi-bin/pages/states/record?record=47>> 12

Eric Marcus, Making History: The Struggle For Gay and Lesbian Equal Rights (1992) 7

David P. McWhirter & Andrew M. Mattison, The Male Couple: How Relationships Develop 116-17 (1984) 5

G.V. Miller, The Gay Male’s Odyssey In The Corporate World: From Disempowerment To Empowerment, 56-63, 136 (1995) 8

Harris M. Miller II, An Argument For The Application Of Equal Protection Heightened Scrutiny To Classifications Based On Homosexuality, 57 S. Cal. L. Rev. 797 (1984) . . . 14

National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998 (1999) 7

National Institute of Justice, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review 2 (1987) 7

Charlotte J. Patterson, Children of Lesbian and Gay Parents, Child Development 63 (1992) 13

Letitia Anne Peplau, Lesbian and Gay Relationships, in Homosexuality: Research Implications for Public Policy 177 (Gonsiorek & Weinrich, eds., 1991) 5

Public Employees Benefits Board, Domestic Partner Coverage Q&A (May 23, 2000) <<http://www.wa.gov:80/hca/PEBB.htm>> 12

James Reid, Development in Late Life: Older Lesbian and Gay Lives in Lesbian, Gay and Bisexual Identities Over

<u>the Lifespan: Psychological Perspectives</u> (D’Augelli & Patterson, eds., 1995)	9
Arlene F. Saluter, <u>Marital Status and Living Arrangements:</u> <u>March 1994</u> , U.S. Bureau of the Census, Current Population Reports, Series P20-484 (1996)	5
Cass R. Sunstein, <u>Sexual Orientation and the Constitution:</u> <u>A Note on the Relationship Between Due Process and Equal</u> <u>Protection</u> , 55 U. Chi. L. Rev. 1161 (1998)	14
Washington State Bar Association, et al., Amicus Curiae Brief, <u>Sutton v. Widner</u> , No. 65427-1 (1997) http://www.wsba.org/sections/fl/amicus/sutton.htm)	5
Washington Education Association, et al., Amicus Curiae Brief, <u>Washington Ass’n of Churches v. Munro</u> , No. 61498-9 (1994) http://www.wsba.org/sections/fl/amicus/sutton.htm)	7
Anne R. Williams, “Hate-Crime Bill Would Protect Gays; Debate Expected To Center Around First Amendment,” Seattle Post- Intelligencer, p. B1, Feb. 10, 1993	7
James D. Woods, <u>The Corporate Closet: The Professional</u> <u>Lives of Gay Men in America</u> 8 (1993)	8

I SUMMARY OF THE ARGUMENT

Amici curiae submit this supplemental brief to expand upon the information provided in their brief in support of the petition for review, dated June 27, 2000 (“Amici I”). To date, this Court has had few opportunities to contemplate the distinct challenges that confront lesbian and gay couples in Washington. Division II has created the need for such consideration here by imposing a new, unjustifiable limitation that would distort the well-established meretricious relationship doctrine.

None of the Court’s prior meretricious relationship decisions ever has identified a claimant’s sex, or the sex of her or his former partner, as a relevant equitable factor. Instead, the Court repeatedly and recently has held that courts should evaluate these equitable claims in a flexible, fact-specific manner. E.g. In re Pennington, 14 P.3d 764, ___, 2000 Wash. LEXIS 915, *16 (2000). Consequently, Division II’s attempt to restrict equity on this basis – thereby denying all gay people the opportunity to present their claims, irrespective of the longevity, interdependence and mutuality of the relationships in question – disregards the essential teachings of the Court’s meretricious relationship jurisprudence.

As in their prior brief, Amici seek to provide the Court with greater factual context concerning the community of people who would be harmed were Division II’s ruling to be affirmed, and to show why equitable relief should, if anything, be more available to these persons. After all, equity’s role is to offer fairness where a rigid, technical application of the law would yield injustice or unjust enrichment. Connell v.

Francisco, 127 Wn.2d 339, 898 P.2d 834 (1995); In re Lindsey, 101 Wn.2d 234, 678 P.2d 328 (1984). Amici believe the Court's assessment of whether gay people should be denied access to this remedy will benefit from understanding that gay people share the same desire and capacity to form committed partnerships as heterosexuals.

A key difference between the life experiences of these two groups, however, is that the history of virulent anti-gay prejudice in this country, and the discrimination that continues today, causes many gay people to conceal the identity of their partners, or the existence of their relationships, to avoid disclosing their minority sexual orientation. For some, the fear of discovery is so intense that they are deterred from seeking legal advice and fulfilling a sincere intention to document their partners' ownership interests. Even within the ostensibly confidential attorney-client relationship, the prospect of revealing one's identity as gay can be exceedingly threatening. This fear can be still stronger for older persons who came of age during even more overtly hostile times.

Respondent Hawthorne's principal response to all of Mr. Vasquez's arguments is to try to engage the Court in an in-depth consideration of whether or not Washington's marriage laws are just. That exegesis does not, however, have any logical relation to the property rule at issue here.

Hawthorne also suggests that a societal interest in supporting those who plan to have children somehow supports the different-sex-only rule created below. But, besides the fact that not all heterosexual couples have or plan to have children, and

that many same-sex couples do, the presence or absence of children has never been a factor in meretricious relationship analysis. And rightly so. This is a rule pertaining solely to intentions concerning property. Thus, Division II's sex-based restriction should be rejected as wholly untenable under the controlling common law doctrine.

In addition to these precedential and equitable concerns, an additional reason counsels against adoption of Division II's approach. Incorporating such a restriction into the framing of the common law at a minimum would raise numerous difficult constitutional issues, and Amici believe that such a limitation in fact would violate equal protection guarantees under both the federal and Washington constitutions. Indeed, because there is no legitimate governmental interest to justify depriving a grieving man of his home and remaining property when he would retain it all were he simply female, Amici submit that the restriction would have to fail irrespective of the degree of scrutiny to which it is subjected.

There is no need to reach these difficult constitutional questions and subject such a rule to equal protection scrutiny, however, because a different-sex-only rule is not justifiable under either precedent or equity. Persons who have shared a home and life together, acquiring property for common benefit, deserve equal treatment when their time as partners ends. To this point in Washington's history, the doors to equity have been open to all, irrespective of their sex or sexual orientation. As we enter this new century, that heritage should be maintained.

II STATEMENT OF INTERESTS OF AMICI CURIAE

Appendix A contains a statement for each amicus curiae.

III STATEMENT OF THE CASE

Amici join in Petitioner Vasquez’s Statement of the Case.

IV AUTHORITY AND ARGUMENT

A **Lesbians and Gay Men Should Not Be Denied Access to Meretricious Relationship Equity Because Same-Sex Partnerships Are Not Distinguishable In Any Pertinent Respect From Different-Sex Partnerships.**

Under settled law, a relationship will be deemed “meretricious” or not for the purpose of equitable property relief depending on how it meets the factors identified in Connell, 127 Wn.2d at 346, and employed consistently since then, including last month in Pennington. These factors are easily listed: stability, continuity of cohabitation, longevity, purpose, financial interdependence, and the parties’ intent. As the Court stressed in Pennington, however, “[t]hese characteristic factors are neither exclusive nor hypertechnical. Rather, these factors are meant to reach all relevant evidence. . . .” Id. at * 16. Thus, although they provide a framework for analysis, the Court has admonished that equity must test “the facts of each case.” Id. at *16.

Of course, the facts in meretricious relationship suits vary greatly. But, contrary to Pennington and its antecedents, the limitation sought to be imposed below would deny a large number of people access to equity categorically, without regard to

the individual facts.¹ Many of these couples are in long-term, committed, cohabiting relationships.² “Couple-hood, either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals.”³ Indeed, studies that included older persons in the sample population reported relationships lasting decades.⁴

Moreover, lesbian and gay couples in long-term relationships develop the same patterns of financial interdependence as their heterosexual counterparts.⁵

Accordingly, when such relationships are ended by the intestate death of one of the partners, the survivors are no less devastated, and the jointly-acquired property is no

¹ Although exact calculations are impossible, experts concluded based on the 1994 census that there were approximately 1.7 million lesbian and gay in couples in the United States. See Amicus Curiae Brief of the Washington State Bar Ass’n, et al., filed in Sutton v. Widner (available at <http://www.wsba.org/sections/fl/amicus/sutton.htm>) (discussing the great many persons living in meretricious relationships, specifically including lesbians and gay men, and citing Arlene F. Saluter, Marital Status and Living Arrangements: March 1994, U.S. Bureau of the Census, Current Population Reports, Series P20-484, pp. 71 and A-10 (1996). From Washington’s percentage of the national population, it can be estimated that there were at least 36,000 same-sex couples living in Washington in 1994. Id.

² Lawrence A. Kurdek, Lesbian and Gay Couples, in Lesbian, Gay and Bisexual Identities Over the Lifespan 243 (D’Augelli & Patterson, eds., 1995). Indeed, surveys of self-identified lesbians have found that roughly three-quarters were in steady relationships, while similar studies of gay men have placed that number at roughly half. Letitia Anne Peplau, Lesbian and Gay Relationships, in Homosexuality: Research Implications for Public Policy 177, 180 (Gonsiorek & Weinrich, eds., 1991); see id. at 195 (“[r]esearch has shown that most lesbians and gay men want intimate relationships and are successful in creating them”).

³ Phillip Blumstein & Pepper Schwartz, American Couples 45 (1983).

⁴ See, e.g., Bryant & Demian, Relationship Characteristics of American Gay and Lesbian Couples: Findings from a National Study, 1 J. Gay & Lesbian Soc. Sci. 101 (1994); David P. McWhirter & Andrew M. Mattison, The Male Couple: How Relationships Develop 116-17 (1984).

⁵ Blumstein & Schwartz, supra, at 94-111 (study of the financial arrangements of married and unmarried heterosexual couples and of lesbian and gay male couples).

less in need of protection. Division II’s attempt to impose a “heterosexuals only” rule would abandon them all – despite their having spent their lives in devoted, lasting relationships – to suffer precisely the unexpected, unfair property loss that the meretricious relationship doctrine exists to cure.

B Because The Established Common Law Doctrine Values Shared Intent To Acquire And Hold Property Jointly, And Exists To Promote Fairness, Gay People In General Should Have Even Stronger Equitable Claims Than Heterosexuals, Due To The Burdens Anti-Gay Hostility Can Place On Gay Couples’ Freedom To Plan And Secure Their Intentions.

Equity exists to do justice – to provide a remedy for unexpected unfairness, or unfairness a person has limited ability to avoid. Connell, 127 Wn.2d at 347; Lindsey, 101 Wn.2d at 304 (“courts must ‘examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property.’”).

Accordingly, application of the doctrine should take into account the adverse conditions that can limit lesbian and gay couples’ ability to plan, and carry out their plans, in ways pertinent to “fairness” and assessments of “unjust enrichment.” Because many gay people experience extremely hostile social attitudes, and even violence, which understandably can cause reluctance to disclose one’s same-sex life partnership even to one’s own attorney, the courts should be more willing to hear the merits of their equity claims rather than less so.

That lesbians and gay men face sometimes extreme antipathy should be beyond dispute. In Justice Brennan’s words, “Outside of racial and religious minorities, we can think of no group which has suffered such ‘pernicious and sustained hostility’ and

such ‘immediate and severe opprobrium’ as homosexuals.” Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014, 84 L.Ed.2d 390, 105 S.Ct. 1371 (1985) (Brennan, J., dissenting from denial of cert.).⁶ And, indeed, the disproportionate levels of violence and harassment directed towards gay people is well-documented.⁷ A study conducted by the Reagan Justice Department, for example, estimated that gay people were the most frequent victims of hate violence in the country.⁸ Sadly, life in the Northwest, including Washington, has been consistent with this disturbing national picture.⁹

In addition to violent hate crimes, widespread employment discrimination

⁶ See generally Eric Marcus, Making History: The Struggle For Gay and Lesbian Equal Rights (1992).

⁷ See, e.g., Gregory M. Herek, Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy, 44 Am. Psychologist 948 (1989) (reporting that 92% of lesbians and gay men have been targets of anti-gay verbal abuse or threats and as many as 24% have been victims of physical attacks because of their sexual orientation).

⁸ National Institute of Justice, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review 2 (1987). Despite increased public discussion of society’s need to control anti-gay violence, this sort of hate crime continues to be a very real national problem. See National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998 (reporting national trends).

⁹ Anne R. Williams, “Hate-Crime Bill Would Protect Gays; Debate Expected To Center Around First Amendment,” Seattle Post-Intelligencer, p. B1, Feb. 10, 1993. See also Linda Keene, “Hate Crimes On Rise In NW – Homosexuals, Racial Minorities Are Targets,” The Seattle Times, p. B1, June 8, 1990. Even in the most tolerant areas, gay people can be vulnerable if identified. A 1984 survey of Seattle residents found that 21% of gay men and 12% of lesbians had been physically attacked due to their sexual orientation. Barbara Laker, “Attacks on Homosexuals Spur ‘Hate-Crime’ Conference,” Seattle Post-Intelligencer, p. C7, Jan. 25, 1990. See also the extensive documentation of anti-gay violence in Washington, and its negative effects, presented in the amicus curiae brief of the Washington Education Association, et al., in Washington Association of Churches v. Munro, No. 61498-9 (1994).

against lesbians and gay men has been confirmed by dozens of studies over the past fifteen years.¹⁰ At present, gay people receive no federal statutory protection against discrimination, and only a minority of states provide it, with Washington not among them.¹¹ The prevalence of anti-gay hostility, and lack of meaningful legal protection, causes many gay people to be terrified of disclosure, and to remain firmly “in the closet.”¹²

This profound sense of fear and vulnerability tends to be even more deeply-rooted among older lesbians and gay men, who grew up in an era when the discrimination was essentially universal, and legal protections were essentially nonexistent. As a result, they appear to be less likely than others to seek the legal help required to plan for the future, even when they are in meaningful, long-term relationships.

To appreciate the significance of this generation gap, consider that lesbians and gay men over sixty years of age are the last generation to have lived most of their

¹⁰ See James D. Woods, The Corporate Closet: The Professional Lives of Gay Men in America 8 (1993). As one leading expert has phrased it: “Job discrimination continues to pose one of the gravest civil rights threats in the lives of lesbian and gay citizens.” John C. Gonsiorek, Threat, Stress, and Adjustment: Mental Health and the Workplace for Gay and Lesbian Individuals in Homosexual Issues in the Workplace 243, 244-45 (Diamant, ed., 1993).

¹¹ See Lambda Legal Defense and Education Fund, Inc., Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation (10/25/1999) (available at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217>).

¹² See, e.g., M. Hequet, “Out at Work: Homosexuality in the Workplace,” Training, Vol. 32, No. 5, p. 53 (June 1995); G.V. Miller, The Gay Male’s Odyssey In The Corporate World: From Disempowerment To Empowerment, 56-63, 136 (1995).

lives before the changes set into motion by the modern gay civil rights movement.¹³

That world “before Stonewall” was even more hostile than today, and for lesbian and gay seniors who are most likely to need the equitable protections of the meretricious relationship doctrine, “[t]heir adult lives took place mostly in an era that was one of the most repressive anti-homosexual periods of our time.”¹⁴

Because identifying as gay in the face of such hostility meant risking “the loss of job, home, friends, and family,”¹⁵ concealment of homosexuality has been a “prerequisite for survival”¹⁶ and a lifelong adaptation tool for some older gay people.¹⁷

In light of this context, it should not be surprising that some older gay people

¹³ See Marcy Adelman, Stigma, Gay Lifestyles, and Adjustment to Aging: A Study of Later-Life Gay Men and Lesbians, 20 J. Homosexuality 7, 10 (1991); Arnold H. Grossman, At Risk, Infected, and Invisible: Older Gay Men and HIV/AIDS, 6 J. Ass’n Nurses in AIDS Care 13, 14 (1995) (“All gay men who are 50 years of age or older have lived half or more of their lives before the 1969 Stonewall Rebellion in New York City, which is considered the beginning of the modern gay liberation movement.”).

¹⁴ Raymond Berger, Research on Older Gay Men: What We Know, What We Need to Know, in Lesbian and Gay Lifestyles: A Guide for Counseling and Education 217, 226 (Woodman, ed., 1992); see also Richard Friend, Older Lesbian and Gay People: A Theory of Successful Aging, 20 J. Homosexuality 99, 103 (1990) (“[O]ne factor older gay and lesbian people have in common is living the major part of their lives through historical periods described as actively hostile and oppressive toward homosexuality.”).

¹⁵ Friend, supra, at 105.

¹⁶ Raymond Berger, The Older Homosexual Man in Perspective, in Gay and Gray: The Older Homosexual Man 186, 191 (Berger, ed., 1982).

¹⁷ James Reid, Development in Late Life: Older Lesbian and Gay Lives, in Lesbian, Gay, and Bisexual Identities Over the Lifespan: Psychological Perspectives, 215, 230, 236 (D’Augelli & Patterson, eds., 1995) (noting that, as a result of their own experiences, many older gay people “perceive that staying in the closet is the best way for them to steer clear of storms and stressors”).

fail to obtain legal advice about how to secure their long-term well-being in the event of a tragedy, even when they are in committed relationships. As one expert has observed, “seeking out and trusting professionals who represent these institutions [including the legal profession] does not now come easily for these elderly.”¹⁸

C Washington’s Marriage Laws, And Arguments Pertaining To Them, Do Not Support A Different-Sex-Only Limitation On Meretricious Relationship Equity.

1. The meretricious relationship doctrine is “wholly unrelated” to marriage, and importing the rules of marriage into this area of equity would be illogical.

Division II’s sex-based restriction of equity finds no justification in Washington’s marriage laws. Contrary to Hawthorne’s repeated assertions, the meretricious relationship doctrine does not “extend the rights and privileges of marriage,” and it is not “exceptionally similar to common law marriage.” See Hawthorne’s Supplemental Brief (“Hawthorne Suppl.”) at 3, 12, 14.

Rather, this Court explicitly, consistently, and very recently has said the that meretricious relationship doctrine is “wholly unrelated” to the marriage laws, and that any similarities between the qualities of the two categories of relationships do not cause equation of these very different legal rules. Pennington, 2000 Wash. LEXIS at *12; Connell, 127 Wn.2d at 348; Lindsey, 101 Wn.2d at 305. Indeed, Hawthorne himself makes this point, and cites numerous cases demonstrating this Court’s clarity

¹⁸ Lora Connolly, Long-Term Care and Hospice: The Special Needs of Older Gay Men & Lesbians, in Health Care for Lesbians and Gay Men: Confronting Homophobia and Heterosexism 77, 85 (Peterson, ed., 1996).

about the limited circumstances in which meretricious relationship equity offers a remedy. Hawthorne Suppl. at 6-8.

The lack of relationship between these legal doctrines is to be expected because they serve such different functions. Marriage is a comprehensive, forward-looking set of rules that governs rights and duties in innumerable circumstances. Meretricious relationship equity seeks to remedy one particular problem, by looking backward and studying acquisition of property. As a result, the doctrines operate independently, and with different criteria.¹⁹

2. The relief Mr. Vasquez seeks is fully consistent with relevant Washington law and policy.

Because meretricious relationship equity is a judicially-developed doctrine, as equity always is, Hawthorne’s suggestion that Mr. Vasquez take his problem to the Legislature makes no sense. Moreover, there is no basis for Hawthorne’s claim that legislative-stated policy bars the relief Mr. Vasquez seeks. Instead, for more than fifteen years, the Legislature rightly has deferred to the Court’s inherent authority and expertise in the field of equity jurisprudence. The Legislature’s unrelated policies regarding marriage are, as stated above, entirely irrelevant here because this is not a marriage case.

¹⁹ Cf. Heinsma v. City of Vancouver, Case No. 99-2-00772-1, at p. 4 (Clark Cty. Sup. Ct. June 26, 2000) (upholding Vancouver domestic partner ordinance as a valid exercise of Home Rule power, and explaining “Nor is the domestic partnership recognition akin to ‘marriage’ in the state of Washington. . . . [D]omestic partnership is limited to insurance purposes. It does not confer any property rights, obligations, and/or community property status.”).

Hawthorne's suggestion that a voter initiative concerning employment discrimination represents applicable state policy is even less apt. Yet it seems he is attempting an even broader argument – that Washington has a blanket policy against recognizing gay families or providing legal protections to gay people in any way, and that – unlike the laws and policies concerning those in different-sex relationships – such policy can only be changed by the Legislature. A quick look at Washington law shows such a suggestion is baseless, however. To begin with, the courts have been expressly critical of per se exclusions of gay people from doctrines that protect family relationships.²⁰

Furthermore, the State provides family benefits to its gay and lesbian workers.²¹ Finally, Washington certainly permits gay couples to protect each other with wills, contracts and other documents, with no threat that they may be voided in any manner akin to Division II's alteration of the rules of equity. Thus, Hawthorne simply errs in urging that the Legislature is and should be the sole source of non-marital legal protections for people in same-sex relationships.

²⁰ See, e.g., In re Cabalquinto, 100 Wn.2d 325, 329, 669 P.2d 886 (1983) (parents' homosexual orientation did not support per se denial of visitation); Wicklund v. Wicklund, 84 Wn.App.763, 770, 932 P.2d 652 (1996) (same).

²¹ Benefits for Gay Partners Rids State of a Catch-22, Seattle Post-Intelligencer, May 26, 2000, at A18; Public Employees Benefits Board, Domestic Partner Coverage Q&A (May 23, 2000) <<http://www.wa.gov:80/hca/PEBB.htm>>. In extending these benefits, the state followed numerous municipal governments that, over the past decade, already had done so, such as Edmonds School District, King County, Lacey, Olympia, Seattle, Seattle City Light Company, Seattle Public Library, Tumwater. See generally Lambda Legal Defense and Education Fund, States and Municipalities Offering Domestic Partnership Benefits and Registries (1999) (<http://www.lambdalegal.org/cgi-bin/pages/states/record?record=47>).

3. Arguments about procreation have no relation to meretricious relationship property disputes.

Hawthorne devotes much of his brief to the unsupported suggestion that gay people are not parents, or that they should not be supported in that role as heterosexual parents are. His effort is beside the point for multiple reasons. First, the fact that Mr. Vasquez and his former partner, Robert Schwerzler, did not raise children, has no bearing on the strength of Vasquez's property claim. On that question, only the long-term, interdependent nature of their domestic relationship is pertinent. The case law governing these equitable claims is unrelated to the law establishing parental rights and responsibilities, just as it is distinct from the hundreds of other Washington laws governing marital relationships.

Second, in addition to being inapposite, the argument is illogical and based on erroneous premises. The argument seems to assume that same-sex couples do not have and raise children, and that the interests of society and children somehow will be served by denying protections to same-sex couples. In fact, there are many, many thousands of same-sex couples who are raising children in Washington.²² Those children are not helped by an increase in the legal vulnerability of their families.

D Were This Court To Approve The Categorical Limitation Sought To Be Imposed Below, Significant Constitutional Problems That Should Be Avoided, Would Be Presented.

The rule proposed by Division II classifies by the sex of one's partner in

²² Charlotte J. Patterson, Children of Lesbian and Gay Parents, Child Develop. 63 (1992). Indeed, experts have estimated there are between one and five million lesbian mothers in the United States, and between one and three million gay fathers. Id.

relation to one's own sex. In addition to being a sex-based classification on its face, this rule in essence contains the definition of sexual orientation. Governmental classifications that distinguish based on sex and/or sexual orientation are subject to constitutional review under both federal and Washington law.²³

Although the type of scrutiny that is appropriate for these classifications under the various applicable state and federal constitutional provisions is a matter of serious dispute,²⁴ it is beyond question that both classifications are subject to equal protection review, and that the different-sex-only rule cannot survive without, at a minimum, a legitimate governmental purpose to which it bears a rational relationship.²⁵ But, no such purpose and relationship exist here.

As discussed above, Hawthorne suggests a purpose can be found in the state's interest in supporting families with children, implying either that lesbians and gay men do not have children, or that the state lacks a comparable interest in supporting

²³ Amici incorporate here by reference their previous presentation of the pertinent legal standards. See Amici I, at 2-6.

²⁴ For example, contrary to Hawthorne's view, numerous respected commentators believe sexual orientation classifications should receive strict scrutiny. See, e.g., Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1163-79 (1988); Harris M. Miller II, An Argument For The Application Of Equal Protection Heightened Scrutiny To Classifications Based On Homosexuality, 57 S. Cal. L. Rev. 797 (1984).

²⁵ See generally Romer v. Evans, 517 U.S. 620 (1996); Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997); Nabozny v. Podlesney, 92 F.3d 446 (7th Cir. 1996); Quinn v. Nassau Cty. Police Dept., 53 F.Supp.2d 347 (E.D.N.Y. 1999); Tester v. City of New York, 1997 U.S. Dist. LEXIS 1937 (1997), all confirming that classifications based on sexual orientation are subject to federal equal protection review, and finding the differential treatment unjustifiable in each case.

those families. As noted, above, any interest the government may have in protecting families with children has no logical connection to why gay people should be excluded from a doctrine governing distribution of property after relationships have ended, irrespective of whether the former partners were raising children.

Hawthorne also contends the analysis of Washington’s marriage law set forth in Singer v. Hara, 11 Wn.App. 243, 522 P.2d 1187 (1974), justifies Division II’s creation of a limiting classification within equity. This contention fails for multiple reasons. First, once again, Singer addressed a claim that the sex-based classification in the marriage law violates the Washington ERA. In rejecting the claim, the appellate court relied explicitly on what it called the “recognized definition” of marriage. 11 Wn.App. at 254-55. But, this is not a marriage case, and this Court has made unmistakably clear that the “recognized definition” of marriage is “wholly unrelated” to the equitable doctrine at issue here. Pennington, at * 12.

In addition, in recent times, other courts have considered, in non-marriage contexts, the form of sex discrimination claim presented here, and have found it persuasive.²⁶ Hawthorne’s reliance on Singer does not rebut the obvious parallel to this case.²⁷

²⁶ See, e.g., Lawrence and Garner v. Texas, 2000 Tex. App. LEXIS 3760 (2000); Baker v. Vermont, 744 A.2d 864 (1999); Tanner v. Oregon Health Sciences University, 157 Or.App. 502, 524, 971 P.2d 435 (1998). See also Gryczan v. State, 283 Mont. 433, 457, 942 P.2d 112 (Mont. 1997) (Turnage, C.J., concurring and dissenting).

²⁷ In addition, although this is not a marriage case and the issue is not presented here, it should be noted that Singer’s rejection of the parallel to Loving v. Virginia has been heartily criticized. See, e.g., Baehr v. Lewin, 74 Haw. 530, 570 (1993). Should this Court, at some future time, find itself presented with the question, it may find that

Of course, as the briefing by the parties in this case makes all too clear, to perform an appropriately thorough constitutional analysis of these classifications, in the context presented here, would involve the Court in numerous complex questions, in unsettled areas of doctrine. This is not a task that is either necessary or appropriate for the Court in this case. As pointed out by amicus curiae ACLU of Washington, courts are duty-bound to avoid deciding constitutional questions when cases can be resolved on common law or statutory grounds. As explained above, this certainly is such a case, because an application of this Court’s precedents (as this Court has authored them, and without improper injection of statutory criteria to which meretricious relationship equity is “wholly unrelated”), in the spirit of equity that animates and harmonizes those precedents, will resolve this case without the constitutionally-infirm classification imposed below.

V CONCLUSION

This is not a marriage case. This Court repeatedly has affirmed the lack of relationship between the equity doctrine at issue here and marriage. There is simply no reason to confuse the limited, property-ownership rule with the comprehensive protections afforded by marriage.

The U.S. Supreme Court held in Romer that the federal equal protection clause does not allow states to slam the door on gay people’s discrimination claims. 517 U.S. at 620. Likewise here, both the Washington and the federal equal protection

analysis – and the many favorable academic and other comments thereon – informative and helpful.

guarantees forbid a categorical bar to the equity claims gay men and lesbians may seek to present concerning property accumulated within relationships that qualify as meretricious under the sex and sexual orientation-neutral criteria previously established by this Court. Equity's core function is to protect justice when narrow legal rules allow gross unfairness; it must fulfill that function equally for all of the state's residents.

Respectfully submitted this 21st day of January, 2001.

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APPENDIX A

STATEMENTS OF INTERESTS OF AMICI CURIAE

Amici curiae are organizations working on behalf of gay people, including older lesbians and gay men, in Washington and nationally.

Lambda Legal Defense and Education Fund (“Lambda”) is the nation’s leading non-profit legal advocate representing lesbians, gay men and people living with HIV/AIDS. Through impact litigation, community education, and public policy work, Lambda works to reduce anti-gay discrimination and to secure full civil rights for gay people in this country. Since its founding in 1973, Lambda has handled cases and has appeared as counsel or amicus curiae in hundreds of cases in federal and state courts, including in Washington. See, e.g., Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. Wash. 1996); Compassion In Dying v. Washington, 85 F.3d 1440 (9th Cir. 1996).

Lambda has participated in a great deal of litigation involving doctrines -- like Washington’s “meretricious relationship” doctrine at issue here -- that offer some legal protection to gay people in non-marital family relationships. See, e.g., V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000) (holding that non-biological lesbian mother was a psychological parent and had standing to seek visitation); Jacks v. City of Santa Barbara, Santa Barbara Cty. Sup. Ct. No. 224122 (Jan. 13, 1999) (rejecting challenge based on California’s marriage laws to city’s domestic partner registry and benefit plan for its workers), appeal dismissed (Nov. 17, 1999); Gay Teachers Ass’n v. Board of Educ., NYLJ, Aug. 23 1991, p. 22, col. 3, aff’d, 585 N.Y.S.2d 1016 (1992) (denying city’s motion to dismiss, after which the case settled with the city extending family benefits to Board of Education employees with domestic partners).

In addition, Lambda has participated in numerous cases concerning federal and state constitutional protections against class-based discrimination against lesbians and gay men. See, e.g., Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (holding that Colorado’s Amendment Two violated the federal equal protection rights of that state’s lesbian, gay and bisexual citizens); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding that school officials violated federal equal protection clause by deliberately leaving student vulnerable to anti-gay abuse by fellow students); Baker v. Vermont, 744 A.2d 864 (1999) (holding that wholesale denial of protections to lesbian and gay couples violates Vermont “common benefits” clause); Tanner v. Oregon Health Sciences University, 157 Or.App. 502, 971 P.2d 435 (1998) (holding that denial of family benefits to lesbian and gay state employees violated state “equal privileges and immunities” guarantee).

Lambda is headquartered in New York, with regional offices in Los Angeles, Chicago, and Atlanta.

Mature Friends is a Seattle-based organization dedicated to meeting the social, health, and political needs of older lesbians and gay men in Washington State. Formed in 1988, Mature Friends has an active program of social, health, travel, philanthropic, and political events of interest to older lesbians and gay men throughout the state. Its membership includes both singles and couples, including several same-sex couples who have been together for over forty years and at least two that have celebrated their fiftieth anniversary together.

Senior Action in a Gay Environment (“SAGE”) is the nation's oldest and largest not-for-profit organization dedicated to meeting the unique needs of older lesbians and gay men through the provision of mental health and social services and through advocacy and public education efforts across the nation. Research has shown that lesbian and gay seniors, estimated at over three million nationwide, are one of the most under-served and at-risk senior populations. Through SAGE affiliates that stretch from coast-to-coast, including an active presence in the Pacific Northwest, along with its National Conference on Aging in the Gay Community and collaborations with the AARP and the American Society on Aging, SAGE works to advance understanding of the special needs of lesbian and gay seniors, and to eliminate both ageism and anti-gay discrimination on behalf of its constituents.

The Washington State PFLAG Council (“PFLAG”) is the statewide body for the twenty-two local chapters of PFLAG in Washington, and the state affiliate of the national organization **Parents, Families, and Friends of Lesbians and Gays**. The Council includes chapters in Tacoma, Vancouver, Yakima, and Spokane. In Washington and nationally, PFLAG promotes the health and well-being of gay, lesbian, bisexual and transgender persons, their families and friends through support, education, and advocacy. PFLAG believes that society at large benefits from an environment that supports committed stable relationships, including same-gender committed relationships, which provide mutual emotional, social, financial, legal and medical support. PFLAG, therefore, supports extending to persons in same-gender committed relationships the full range of legal rights and protections, as well as responsibilities and obligations, for the good of those couples, their families, and society as a whole.