IN THE SUPREME COURT OF THE STATE OF OREGON

MARY LI and REBECCA KENNEDY; STEPHEN KNOX, M.D., and ERIC WARSHAW, M.D.; KELLY BURKE and DOLORES VETRI and DOUGLAS DEWITT; SALLY SHEKLOW and ENID LEFTON; IRENE FARRERA and NINA KORICAN; WALTER FRANKEL and CURTIS KEIFER; JULIE WILLIAMS and COLEEN BELISLE; BASIC RIGHTS OREGON; and AMERICAN CIVIL LIBERTIES UNION OF OREGON
Plaintiffs-Respondents, Cross-Appellants, and Petitioner on Review,

and

MULTNOMAH COUNTY,
Intervenor-Plaintiff-Respondent, Cross-Appellant,

v.

STATE OF OREGON; THEODORE KULONGOSKI, in his official capacity as Governor of the State of Oregon; HARDY MYERS, in his official capacity as Attorney General of the State of Oregon; GARY WEEKS, in his official capacity as Director of the Department of Human Services of the State of Oregon; and JENNIFER WOODWARD, in her official capacity as State Registrar of the State of Oregon,
Defendants-Appellants, Cross-Respondents,

and

DEFENSE OF MARRIAGE COALITION, CECIL MICHAEL THOMAS, NANCY JO THOMAS, DAN MATES, and DICK JORDAN OSBORNE,
Intervenors-Defendants-Appellants, Cross-Respondents.

SC No. S51612

Multnomah County Circuit Court No. 0403-03057

BRIEF OF CIVIL RIGHTS AND HISTORIANS *AMICI CURIAE*

Appeal from the Judgment of the Circuit Court for Multnomah County
The Honorable Frank Bearden, Judge

[Attorneys on Inside Cover]

October 2004

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I. INTRODUCTION

This brief is submitted on behalf of a number of organizations and individuals who have been actively involved in efforts to preserve, protect, and expand equal treatment and equal opportunity under the law for all individuals and classes of individuals, and on behalf of two historians who have expertise in the history of miscegenation statutes in Oregon. The organizations and individuals who join this brief are listed in the Appendix, with a brief description of each of them.

These *amici* submit this brief to address two issues: (1) the suggestion in the trial court opinion that a violation of Article I, section 20, can be remedied by something less than full equality, and (2) the contention made by Intervenor-Defendant Defense of Marriage Coalition that the promise of equality set out in Article I, section 20, should be limited by the conception of equality held by the delegates to Oregon's constitutional convention in 1857.

II. "SEPARATE BUT EQUAL" IS A CONCEPT THAT WORKS TO DISADVANTAGE ALL DISFAVORED CLASSES. IT HAS NO PLACE IN ARTICLE I, SECTION 20, JURISPRUDENCE

Although the trial court held that Oregon's marriage statutes violate Article I, section 20, on the ground that "the effect of ORS Chapter 106 is to impermissibly classify on the basis of sexual orientation, the repercussions of which deny same-sex couples certain substantive benefits" (Opinion, 4/20/04, at 11; State's Brief, App-17), the court did not order the State to make marriage available to same-sex couples. Rather, the court stated that it was "not extending ORS Chapter 106 to same-sex couples' right to marriage but to their right to benefits, and thus finding that alternative means should be provided to address this disparity." *Id*.

By suggesting that "alternative means" would be adequate to remedy a violation of Article I, section 20, the trial court was proposing a species of the "separate but equal" concept that had its genesis in laws that categorized persons according to race. That concept has been discredited in the context of racial classifications, and it should not be resurrected in the context of sexual orientation discrimination.

In *Plessy v. Ferguson*, 163 US 537, 16 S Ct 1138, 41 L Ed 256 (1896), the Court sustained a Louisiana statute that required "equal but separate accommodations" for "white" and "colored" railroad passengers. The majority reasoned that:

> "Laws [requiring separation of the races] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other ***." *Id*. at 544.
>
> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id*. at 551.

In his dissenting opinion in *Plessy*, Justice Harlan stripped away the pretense that underlay that reasoning. "Every one knows," he wrote, "that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. *** The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches." *Id*. at 557 (Harlan, J., dissenting). It was clear to Justice Harlan that laws requiring separation of the races "proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens," *id*. at 560 (Harlan, J., dissenting), and that "[t]he thin disguise of 'equal'

accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done." *Id*. at 562 (Harlan, J., dissenting).

Justice Harlan's dissenting opinion in *Plessy* is probably the most honored dissenting opinion in the history of the U.S. Supreme Court. Its reasoning was vindicated in *Brown v. Board of Education*, 347 US 483, 74 S Ct 686, 98 LEd 873 (1954), in which the Court interred the "separate but equal" doctrine as it applied to racial classifications. "In approaching this problem," the Court said, "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1895 when *Plessy v. Ferguson* was written." *Id*. at 492. The "question presented," the Court stated, was this: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" *Id*. at 493.

The Court answered that question in the affirmative, relying in large measure on "qualities which are incapable of objective measurement," *id*. at 493 (internal quotation marks and citation omitted), and "intangible considerations," *id*., comparable to those that had led Justice Harlan to conclude that the concept of "separate but equal" was not, and could not be, consistent with the promise of the Equal Protection Clause. Separation of black children from white children in the educational process solely on the basis of race, the *Brown* Court said, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id*. at 494. The Court quoted with approval the finding of the trial court in that case that when segregation of children in public schools "has the sanction of the law," that policy "is usually interpreted as denoting the inferiority of the negro group." *Id*. The Court expressly rejected "[a]ny

language in *Plessy v. Ferguson* contrary to this finding," and concluded, therefore, that "[s]eparate educational facilities are inherently unequal." *Id*. at 494-95.

In a series of cases decided in the years immediately after *Brown*, the Court made it clear that the rationale of that decision was not limited to public education. The Court held that enforced separation of persons according to race was a violation of the Equal Protection Clause in a variety of contexts, including public beaches, *Mayor of Baltimore v. Dawson*, 350 US 877, 76 S Ct 133, 100 L Ed 774 (1955); city buses, *Gayle v. Browder*, 352 US 903, 77 S Ct 145, 1 LEd2d 114 (1956); golf courses, *Holmes v. Atlanta*, 350 US 879, 76 S Ct 141, 100 L Ed 776 (1955); and city parks, *New Orleans City Park Improvement Association v. Detiege*, 358 US 54, 79 S Ct 99, 3 LEd2d 46 (1958).

These cases show that the decisive factor in *Brown* was not that segregation laws inflicted the stigma of inferiority on black people *in public education*; rather, the vice of segregation laws — and the reason that they violated the Equal Protection Clause — was that they inflicted *the stigma of inferiority on black people*. By transforming a social custom of racial separation into a requirement of law, states had made it a principle of public policy that black people were unworthy to associate with white people. That principle was applied in nearly every aspect of public life: not only in the institutions of government itself, like public schools, courthouses, and municipal transit systems, but also in social and recreational facilities like beaches, movie theaters, golf courses and swimming pools — and, most pertinently for purposes of this case, in matters of sexual relations and marriage.

The historical evolution of the Supreme Court's attitude toward officially-sanctioned racial discrimination in sexual relations and marriage paralleled the evolution of its attitude toward segregation in other areas of life. The short-sighted view of "equality" expressed by the majority in *Plessy* had been foreshadowed, in the previous decade, by the Court's

decision in *Pace v. Alabama*, 106 US (16 Otto) 583, 1 S Ct 637, 27 L Ed 207 (1883). In that case, the Court upheld an Alabama statute that authorized more severe penalties for adultery and fornication between a white person and a black person than for the same conduct between two members of the same race. Brushing aside the equal protection challenge in a unanimous three-paragraph opinion, the Court held that there was nothing discriminatory about the statute: since it applied "equally" to members of both races, there was no "discrimination against either race." *Id*. at 585.

Precisely the same reasoning was used by state courts in that same era, in rejecting equal protection challenges to miscegenation laws. *See*, *e.g*., *Green v. State*, 58 Ala 190, 29 Am Rep 739, 1877 WL 1291 at *2 (1877) (each party to interracial marriage "is punishable for the offense prohibited, in precisely the same manner and to the same extent"); *State v. Gibson*, 36 Ind 389, 10 Am Rep 42, 1871 WL 5021 at *3 (1871) (black persons were "protected by [miscegenation] laws in the same manner, and to the same extent, that white citizens were protected"). This Court, too, accepted and applied that same reasoning as late as 1921, when it rejected a constitutional challenge to an Oregon miscegenation statute on the ground, *inter alia*, that it "applie[d] alike to all persons," regardless of race. *In re Estate of Fred Paquet*, 101 Or 393, 399, 200 P 911 (1921). (The *Paquet* case is discussed more fully in Section III of this brief, below.)

It was not until 1948 that a miscegenation statute was invalidated on equal protection grounds — and then, only at the state level. "The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California." *Loving v. Virginia*, 388 US 1, 6 n 5, 87 S Ct 1817, 18 LEd2d 1010 (1967),

citing *Perez v. Sharp*, 32 Cal2d 711, 198 P2d 17 (1948).[1] The California court in *Perez* noted that the miscegenation statute had been defended on the ground that it "does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race," 198 P2d at 20, but the court rejected that argument, noting that "Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Id*. at 25. The true genesis of miscegenation laws, the court said, lay in "the prejudices of the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior." *Id*. at 26.

The court's analysis and conclusion in *Perez* presaged the U.S. Supreme Court's decisions in the 1960s overruling *Pace v. Alabama* and interring, once and for all, miscegenation laws of all kinds. In *McLaughlin v. Florida*, 379 US 184, 85 S Ct 283, 13 LEd2d 222 (1964), the Court overruled *Pace*, holding that it "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *Id*. at 188. Despite that holding, the State of Virginia continued to rely on the reasoning of *Pace* when it defended its miscegenation statutes before the Court three years after *McLaughlin* was decided. "[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race." *Loving v. Virginia*, 388 US at 8. The Court emphatically rejected that argument, noting that the fact that Virginia's laws prohibited "only interracial marriages involving white persons" showed that they were "measures designed to maintain White Supremacy." *Id*. at 11.

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[1] The case is entitled "*Perez v. Sharp*" in the California state reports, and "*Perez v. Lippold*" in the Pacific Reporter.

Thus, the miscegenation laws, like the laws mandating segregation in public schools, parks, beaches, and other recreational facilities, were not struck down because they failed to provide formal equality to persons of different races. The whole point of the "separate but equal" concept, after all, was that the facilities available to black persons were (at least in theory) "equal" to those that were available to white persons. And although public educational and recreational facilities available to black persons were rarely, if ever, "equal" to those available to white persons, it is true that the very concept of "segregation" did, in fact, have a fearsome "equality" to it: if black people were barred from swimming at the beaches reserved for white persons, so were white people barred from swimming at the beaches reserved for black persons. If a black person could not marry a white person, so was a white person barred from marrying a black person. The "separate but equal" concept perfectly embodied the kind of "equality" famously satirized by Anatole France: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[2]

Formal equality, therefore, was not the real issue in these cases. Rosa Parks was going to arrive at her destination at the same time, regardless of whether she sat in the front or the back of the bus; and if the seats in the back of the bus had been roomier and more comfortable than those in the front, it would still have been a violation of the Equal Protection Clause for the City of Montgomery to require Ms. Parks to sit in the back. By the same token, if the public schools that were reserved for black students in Topeka, Kansas, had had far better teachers and equipment than the schools that were reserved for white students, it would still have violated the Equal Protection Clause to require Linda Brown to

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[2] Anatole France, *The Red Lily*, ch. 7 (1894), quoted in *Griffin v. Illinois*, 351 US 12, 23, 76 S Ct 585, 100 L Ed 891 (1956) (Frankfurter, J., concurring).

attend the "blacks only" school. And the fact that the miscegenation laws operated to bar both blacks and whites from marrying each other did not disguise the fact that the real purpose and effect of those laws was "to maintain White Supremacy," *Loving v. Virginia*, 388 US at 11, and to foster "the belief that certain races are inferior." *Perez v. Sharp*, 198 P2d at 26.

Thus, the issue in these cases was not formal equality. It was human dignity. It was respect under the law. When black persons were required to sit in the back of the bus, the purpose and intent was to send a message: black persons are not worthy to share in the good things that white persons want to reserve for themselves. When blacks were forced to attend separate schools, the purpose and intent was to send a message: black persons are not worthy to associate with white people. When black persons and white persons were forbidden to intermarry, the purpose and intent was to send a message: black persons are not worthy to marry white persons. All such laws could be justified under a "separate but equal" argument, but all such laws sent the same message: black persons are inferior; black persons are not worthy.

The *Brown* decision, of course, was controversial, and its repudiation of the "separate but equal" doctrine was criticized by many commentators. But history has vindicated *Brown*, and academic criticism of the decision was considerably reduced after the publication of a law review article by Professor Charles Black that went to the heart of the matter. After Professor Herbert Wechsler published an article in the Harvard Law Review questioning whether *Brown* was based on "neutral principles,"[3]

> "Charles Black famously replied that the 'purpose and impact of segregation in the southern regional culture' were 'matters

[3] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv L Rev 1 (1959).

> of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world,' and stated: '[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers — that of laughter.'"[4]

More recently, Professor Kenneth Karst put it this way:

> "When a city segregates the races on a public beach, the chief harm to the segregated minority is not that those people are denied access to a few hundred yards of surf. Jim Crow was not just a collection of legal disabilities; it was an officially organized degradation ceremony, repeated day after day in a hundred ways, in the life of every black person within the system's reach." Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 4 (1989).

Quoting an earlier article by Professor Karst, Justice O'Connell made a similar point in *Schwenk v. Boy Scouts of America*, 275 Or 327, 551 P2d 465 (1976):

> "The evil at which [anti-discrimination statutes] is aimed is not simply the unfairness which results in denying certain material benefits to one group when they are at the same time made available to others; it is aimed at the elimination of practices which deprive a person of his individuality by insisting that he bear the stamp of his class. As Kenneth Karst observes ***:
>
> "'It is state sponsorship of the symbolism of inferiority that is unconstitutional.
>
> "'Inequality is harmful *chiefly* in its impact on the psyches of the disadvantaged. What really matters about inequality is something that happens inside our heads:
>
> "'"'The peculiar evil of a relative deprivation is psychic or moral; it consists of an affront; it is immediately injurious insofar as resented or taken personally, and consequentially injurious insofar as demoralizing."'" *Schwenk*, 275 Or at 339-40 (O'Connor, J., dissenting) (quoting Kenneth Karst, "'A

[4] Kathleen M. Sullivan & Gerard Gunther, *Constitutional Law* 644-45 (14th ed 2001), quoting Charles L. Black, Jr., "The Lawfulness of the Segregation Decisions," 69 Yale L J 421 (1960).

> Discrimination So Trivial': A Note on Law and the Symbolism of Women's Dependency," 49 Los Angeles Bar Bulletin 499, 502 (Oct 1974), in turn quoting Frank I. Michelman, "On Protecting the Poor Through the Fourteenth Amendment," 83 Harv L Rev 7, 49 (1969)) (emphasis in original; ellipses and brackets omitted).

Brown and its progeny were aimed at the elimination of these affronts to human dignity, and those decisions have come to be viewed as applications of what Professor Karst has called the "principle of equal citizenship," which "presumptively insists that every individual is entitled to be treated by the organized society as a respected and responsible participant. Stated negatively, the principle presumptively forbids the organized society to stigmatize an individual as a member of an inferior or dependent caste, or as a nonparticipant." Kenneth L. Karst, *Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion* at x (1993).

That concept of "equal citizenship" has not been limited to classifications based on race, as several examples illustrate. First, in the sphere of religious belief, the U.S. Supreme Court (like this Court) has emphasized that government may not treat certain groups of citizens as outsiders, simply because of their religious faith. Thus, just as this Court has said that "church affiliation cannot be made one of the 'terms' on which equality may be conditioned under Article I, section 20, with respect to 'privileges or immunities' that are not themselves guaranteed," *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or 471, 490, 695 P2d 25 (1985), so has the U.S. Supreme Court adopted Justice O'Connor's view that governmental endorsement of a particular religious practice is forbidden by the Establishment Clause because "it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Independent School Dist. v. Doe*, 530 US 290, 309-10, 120

S Ct 2266, 147 LEd2d 295 (2000), quoting *Lynch v. Donnelly*, 465 US 668, 688, 104 S Ct 1355, 79 LEd2d 604 (1984) (O'Connor, J., concurring). The concept of "equal citizenship," in other words, bars government from labeling persons as "insiders" or "outsiders" on the basis of their religion.

Second, the Supreme Court's modern gender discrimination cases have rejected the long-held view that it was permissible, under the Equal Protection Clause, to limit the ability of women to participate as full and equal members in the economic and social life of the nation. It was only a little over a half-century ago that the Court could confidently assert that a state "could, beyond question, forbid all women from working behind a bar," because "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures." *Goesaert v. Cleary*, 335 US 464, 465, 466, 69 S Ct 198, 93 L Ed 163 (1948). The Court's attitude in 1948 had changed little from the attitude expressed by three members of the Court in *Bradwell v. Illinois*, 83 US 130, 21 L Ed 442 (1872), who concurred in a judgment affirming an Illinois Supreme Court ruling that a woman could be excluded from the practice of law on the ground that:

> "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." 83 US at 141 (Bradley, J., joined by Swayne and Field, JJ., concurring).

In the view of those Justices, in other words, men and women should be content to live their lives in "spheres" that would forever be separate (but no doubt "equal," in the minds of some).

In the years since *Goesaert* was decided in 1948, its assumption that the Equal Protection Clause does not prevent a state from establishing separate and exclusive spheres of activity for men and women has been emphatically repudiated. It is no longer open to doubt that a state may not shunt women off into separate nursing schools that men may not enter, *Mississippi University for Women v. Hogan*, 458 US 718, 102 S Ct 3331, 73 LEd2d 1090 (1982), or into separate programs for military training, *United States v. Virginia*, 518 US 515, 116 S Ct 2264, 135 LEd2d 735 (1996). Such state-enforced separation of people according to gender was based in large measure on "archaic and overbroad generalizations about women," *Mississippi University for Women*, 458 US at 730 n 16, and it had its roots in the long-prevailing attitude, reflected in *Goesaert* and *Bradwell*, that women had no place in the political and economic life of the nation. That attitude no longer prevails; in the case of gender discrimination, as in the case of race discrimination, "separate but equal" is no longer a viable concept.

Third, and most importantly for purposes of this case, the Court has made it clear that "separate but equal" similarly has no place with respect to sexual orientation. The concept of "equal citizenship" was at the heart of the Court's decision in *Romer v. Evans*, 517 US 620, 116 S Ct 1620, 134 LEd2d 855 (1996), in which the Court struck down, as a violation of the Equal Protection Clause, Amendment 2 to the Colorado Constitution. Amendment 2 prohibited all governmental action "designed to protect the named class" of gay and lesbian persons, 517 US at 624, and it "impose[d] a special disability upon [gay and lesbian persons] alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Id*. at 631. For these reasons, "the amendment seems inexplicable by anything but animus toward the class it affects ***." *Id*. at 632.

As Professor Karst noted, Amendment 2 achieved its stigmatizing effect by "formally declaring the separation of a group of people from the community of citizens who are worthy of governmental protection against discrimination."[5] And it was exactly that feature of Amendment 2 – its effect of creating a separate class of people deemed unworthy of full participation in the body politic – that the Court stressed in striking it down. In the very first sentence of the *Romer* opinion, the Court quoted Justice Harlan's rejection of the "separate but equal" doctrine in his dissenting opinion in *Plessy*:

> "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens." 517 US at 623, quoting *Plessy*, 163 US at 559 (Harlan, J., dissenting).

By beginning with that quotation, the Court emphasized the fundamental truth that "the Equal Protection Clause is concerned with the avoidance of caste and the right of all citizens to participate in civil society ***."[6] The paragraph in Justice Harlan's opinion from which the *Romer* Court took its opening quotation makes precisely that point:

> "The white race deems itself to be the dominant race in this country. *** But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy*, 163 US at 559 (Harlan, J., dissenting).

That reasoning was at the heart of *Romer*, as the concluding paragraph of that opinion makes clear: "Amendment 2 classifies homosexuals *** to make them unequal to

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[5] Kenneth L. Karst, *Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion* 185 (1993).

[6] Joseph S. Jackson, "Persons of Equal Worth: *Romer v. Evans* and the Politics of Equal Protection," 45 UCLA L Rev 453, 486 (1997).

everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." 517 US at 635.

In adopting marriage laws that are limited to heterosexual couples, Oregon has deemed "a class of persons a stranger" to those laws. It has, through its marriage statutes, decreed that persons who wish to marry persons of their own sex are "unequal to everyone else." Like the city that resisted the construction of a group home for mentally disabled persons in *City of Cleburne, Tex. v. Cleburne Living Center*, 473 US 432, 87 S Ct 3249, 87 LEd2d 313 (1985), Oregon, in its marriage laws, treats same-sex couples "as outsiders, pariahs who do not belong in the community." *Id*. at 473 (Marshall, J., concurring in part and dissenting in part). By granting to opposite-sex couples, but not to same-sex couples, the opportunity to enjoy the status and the dignity of "marriage," together with the innumerable privileges and immunities that appertain to that status, Oregon has violated Article I, section 20. It cannot remedy that violation by creating a "separate but equal" version of that status without doing precisely what Justice Harlan believed that Louisiana had done by requiring black persons to travel in "separate but equal" railroad carriages, and what the *Brown* Court held that Topeka, Kansas, had done in requiring black persons to attend "separate but equal" schools, and what the *Romer* Court held that Colorado had done in prohibiting gay and lesbian persons from seeking the protection of basic civil rights statutes: namely, create a caste system in which certain statuses and dignities are reserved for one category of citizens who are deemed more worthy than others to share in those statuses and dignities.

The "separate but equal" doctrine is a rejected relic of a by-gone era in federal constitutional law. It has no place in Oregon constitutional law, and this Court should hold

that the trial court erred in suggesting that the State can comply with Article I, section 20, by adopting a second-class version of "marriage" reserved for second-class citizens.

III. THIS COURT HAS IMPLICITLY REJECTED THE CONTENTION THAT "HISTORICAL EXCEPTIONS" SHOULD GOVERN THE APPLICATION OF ARTICLE I, SECTION 20. IT SHOULD MAKE THAT REJECTION EXPLICIT IN THIS CASE, LEST ALL DISFAVORED CLASSES BE VULNERABLE AGAIN TO INVIDIOUS DISCRIMINATION

The Defense of Marriage Coalition ("DOMC") contends that "marriage constitutes an historical exception to any absolutist or hyper-technical reading of Article I, section 20" (DOMC Br. at 15), and it goes on to refer to "this Court's historical exceptions doctrine." (*Id*. at 17.) The premise of those statements, that there is an independent "historical exception" doctrine in this Court's state constitutional jurisprudence, is mistaken.

Article I, section 20, is part of the original Oregon Constitution. This Court has said that in interpreting a provision of the original constitution, a court's "focus must be on the intent of the enactors of the provision at issue." *Stranahan v. Fred Meyer, Inc*., 331 Or 38, 57 n 12, 11 P3d 228 (2000). The contention that there is an "historical exception" to the language of such a provision is simply another way of saying that the enactors did not intend their language to apply in a particular context.

According to DOMC, Article I, section 20, guarantees "equality" only as that term was commonly understood in 1857. Acceptance of that contention would have ramifications extending well beyond discrimination against same-sex couples.

We know very little about the intentions of the framers with respect to several provisions of the Oregon Constitution, because there are no surviving letters or pamphlets that reveal the thinking of the delegates to the constitutional convention. However, both the language of the constitution itself and the reported debates at the convention reveal a great deal about the framers' intention with respect to the concept of "equal" treatment under the

law, as guaranteed in Article I, section 20. Much of that evidence is summarized in *Cox v. State of Oregon*, 191 Or App 1, 7-8, 80 P3d 514 (2003) (Schuman, J., concurring), and it fully supports Judge Schuman's observation that:

> "[T]he framers of the Oregon Constitution, whatever else their virtues, had a conception of equality that contemporary legal (and moral) principles has emphatically repudiated. If this court or the Supreme Court were to interpret Article I, section 20, as the framers intended, the court would have to conclude that section 20 permits official invidious governmental discrimination based on race, ethnicity, and gender, which, in turn, would require overruling a significant number of cases and interpreting Oregon's equality guarantee to provide many fewer protections than the minimum required by the Equal Protection Clause of the United States Constitution." *Id*. at 6-7 (Schuman, J., concurring).

To Judge Schuman's list of constitutional provisions that support that observation may be added Article XV, section 8, of the original constitution, which read as follows:

> "No Chinaman, not a resident of the State at the adoption of this Constitution, shall ever hold any real estate, or mining claim, or work any mining claim therein. The Legislative Assembly shall provide by law in the most effectual manner for carrying out the above provisions."

That section remained part of the Constitution until 1946, when it was repealed by the relatively narrow margin of 54.8% to 45.2%. (2003-2004 Oregon Blue Book at 304.)

There is no doubt that the authors of Article I, section 20, did not intend their promise of equal "privileges" and "immunities" under the law to extend in full measure to African Americans, to Asian Americans, to Native Americans, and to women. There is similarly no doubt that the delegates to the 1857 convention would not have intended to include persons with disabilities as members of a class that could claim the protection of Article I, section 20. There is no mention of such persons in the debates of the convention, but it is unlikely that attitudes toward persons with disabilities were any more enlightened in Oregon in 1857 than they were in the halls of the U.S. Supreme Court in 1927, when the

Court issued its opinion in *Buck v. Bell*, 274 US 200, 47 S Ct 584, 71 LEd 1000 (1927). In that case, the Court, in an opinion by Justice Holmes, upheld a Virginia statute that authorized, in the Court's words, "the sterilization of mental defectives," *id*. at 205. The Court discerned no due process or equal protection impediment to the statute, for it was merely aimed at those who "sap the strength of the State," *id*. at 207, and in the Court's view, it was reasonable for the State to wish "to prevent our being swamped with incompetence." *Id*. The Court regarded plaintiff's equal protection challenge to the statute as so lacking in merit that it hardly deserved mention; it was "the usual last resort of constitutional arguments," the Court said, to contend that a classification violates the Equal Protection Clause. *Id*. at 208.

It is reasonable to assume that a similar attitude prevailed in Oregon in 1857. Disabled persons, like African Americans, Native Americans, Asian Americans, and women of all races, were not regarded as constituting the kind of "class of citizens" that could invoke the protections of Article I, section 20. "Equality," as that concept was understood in the political, social and cultural context of the Oregon territory in 1857, meant equality for physically and mentally capable adult white males.

But if the framers of the Oregon Constitution had an understanding of "equality" that was for the most part limited to adult white males like themselves, the language that they chose in establishing a constitutional *principle* of equality was *not* so limited. Article I, section 20, provides that "[n]o law shall be passed granting to *any* citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to *all* citizens." (Emphasis added.) This Court has noted that the broad guarantees contained in constitutional language must not be limited merely because there is evidence that the framers did not foresee, or did not intend, the possible applications of that language in future

years. "For example, the political generation that adopted the first amendment also attempted to suppress political criticism by enacting the Alien and Sedition Acts." *State ex rel Oregonian Pub. Co. v. Deiz*, 289 Or 277, 284, 613 P2d 23 (1980).

Equally important, the delegates to the constitutional convention in 1857 understood that (to paraphrase Chief Justice Marshall) it was a *constitution* that they were writing.[7] They knew that the law was not static; they knew that there had been many developments in constitutional law since the founding of the Republic. "Many changes have taken place since our fathers first formed constitutions," Delazon Smith told the convention (Charles A. Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* at 101 (1926)), and it is clear that the delegates borrowed heavily from the Indiana Constitution precisely because its provisions were stronger and more explicit that comparable provisions of earlier state constitutions. That was particularly true of provisions relating to individual liberty; as this Court has noted, "the Bill of Rights in the Indiana Constitution was described during the Oregon constitutional convention as being 'gold refined' and as 'assert[ing] the civil rights of the citizens as ascertained in those 70 years of progress [since the United States Constitution was adopted].'" *State v. Rogers*, 330 Or 282, 298, 4 P3d 1261 (2000) (quoting Carey, *supra*, at 101-02; brackets added by this Court).

Some parts of the Constitution, of course, are very precise, and were intended to be read literally. The Senate may never have more than 30 members, and the House of Representatives may never have more than 60. Or Const, Art IV, § 2. The governor must be at least 30 years old. Or Const, Art V, § 2. No capitol building could be built until 1865. Or Const, Art XIV, § 3.

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[7] "[W]e must never forget, that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 17 US (4 Wheat) 316, 407, 4 L Ed 579 (1819) (emphasis in original).

In other parts of the Constitution, however, particularly in the Bill of Rights in Article I, the framers used language that was meant to encompass noble and expansive ideals: they promised protection for the "enjoyment of religeous [*sic*] opinions" and "the rights of conscience" (Art I, § 3), and for "the free expression of opinion" and "the right to speak, write, or print freely on any subject whatever" (Art I, § 8). They promised that "justice shall be administered, openly and without purchase, completely and without delay" (Art I, § 10) and that incarcerated persons would not "be treated with unnecessary rigor" (Art I, § 13). They promised that "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." (Art I, § 15.) They promised that "no law" could ever be passed "restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good. (Art I, § 26.) And they promised that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." (Art I, § 20.)

The delegates to the constitutional convention in 1857 did not believe that their attitudes regarding the great principles that they enshrined in the Oregon Bill of Rights, including its protection for freedom of speech, religion, and assembly, and its guarantee of equality under the law, represented the culmination of human wisdom and goodness, any more than those of preceding generations had done. They acknowledged the "70 years of progress" that had occurred in constitutional thought regarding the rights of individuals since the federal constitution was adopted (*see State v. Rogers*, *supra*, 330 Or at 298), and there is no evidence that they believed that "progress" stopped in 1857. They knew that concepts of equality had evolved, and would continue to evolve. When they met in Salem in 1857, it had already been authoritatively stated that it was in the very nature of a constitution

that "only its great outlines should be marked, its important objects designated," *McCulloch v. Maryland*, 17 US at 407, and there is nothing in the records of the convention debates to indicate that the Oregon framers had a different view. Accordingly, like the framers of the U.S. Constitution, the Oregon framers included "[g]reat concepts" in their document that

> "were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Mutual Insurance Co. v. Tidewater Transfer Co*., 337 US 582, 626, 69 S Ct 1173, 93 LEd 1556 (1949) (Frankfurter, J., dissenting).

The framers of the Oregon Constitution knew that the great concepts that they included in Oregon's Bill of Rights would be invoked by persons and applied in situations that they did not foresee, and they knew, just as those who came before them and those who came after them knew, that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 US 558, ___, 123 S Ct 2472, 2484, 156 LEd2d 508 (2003).

The progressive development in the concept of equality that the framers almost certainly foresaw is vividly illustrated in this Court's opinions. A century ago, this Court's vision of equality, like that of the framers, was narrow indeed. In *State v. Muller*, 48 Or 252, 85 P 855 (1906), *aff'd* 208 US 412, 28 S Ct 324, 52 LEd 551 (1908), the Court rejected a challenge based on Article I, section 20, to a statute that prohibited women from working in "any mechanical establishment, or factory, or laundry" for more than 10 hours a day. This Court stressed the need to protect "the physical well-being of females," 48 Or at 255, who are "unable, by reason of their physical limitations, to endure the same hours of exhaustive labor as may be endured by adult males." *Id*. at 257 (internal quotation marks and citation omitted). Although the statute was defended on the ground that it protected women, its effect was to "bar[] women from earning overtime and [to] hinder[] women's

employment opportunities by excluding them from jobs requiring overtime." *Hibbs v. Department of Human Resources*, 273 F3d 844, 862 (9th Cir 2001), *aff'd sub nom. Nevada Dept. of Human Resources v. Hibbs*, 538 US 721, 123 S Ct 1972, 155 LEd2d 953 (2003).

A year after its *Muller* opinion, this Court rejected a challenge based on Article I, section 20, to a statute that "permits males of full age to enter and remain in a saloon and denies such right to women." *State v. Baker*, 50 Or 381, 385, 92 P 1076 (1907). The Court explained:

> "By nature citizens are divided into the two great classes of men and women, and the recognition of this classification by laws having for their object the promoting of the general welfare and good morals does not constitute an unjust discrimination." *Id*. at 385-86.

And as noted earlier, the Court in 1921 rejected a constitutional challenge to a statute that made it unlawful "for any white person male or female, to intermarry with any negro, Chinese, or any person having one fourth or more negro, Chinese, or Kanaka blood, or any person having more than one half Indian blood." *In Re Estate of Fred Paquet*, *supra*, 101 Or at 398, quoting Or Laws, § 2163. The Court declared that this miscegenation law "does not discriminate" because "[i]t applies alike to all persons either white, negroes, Chinese, Kanaka or Indians." *Id*. at 399.

Although the wording of Article I, section 20, has not changed since 1857, this Court's interpretation and application of that wording, and its understanding of the idea of equality, have changed dramatically since the Court issued its decisions in *Muller*, *Baker*, and *Paquet's Estate*. The notion that the guarantee of equal privileges and immunities is reserved for white males has been emphatically rejected. In *Namba v. McCourt and Neuner*, 185 Or 579, 204 P2d 569 (1949), the Court considered whether a statute that barred persons of Japanese descent from owning real property could survive a challenge under Article I,

section 20 (as well as other provisions). The Court noted that in the preceding quarter century, "significant changes took place in our understanding of constitutional law," *id*. at 603, and that:

> "Recent developments in constitutional law, which seek to realize the goal for which the equality clause aims, emphasize with increasing stress that no classification can be countenanced unless (a) it is based upon real and substantial differences which are relevant to the purpose which the act seeks to achieve, and (b) the purpose itself is a permissible one." *Id*. at 603-04.

Those "recent developments," the Court said,

> "render it clear that no statute is valid which discriminates against any one on account of his race, color or creed. 'All men are created equal' in the contemplation of law so far as concerns their color, race and creed. Race, color and creed can gain for no one any rights in any of our three departments of government, and likewise no department can impair any one's rights on account of his race, color or creed. The decisions make it clear that legislation which violates those simple precepts is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. *It is equally repugnant to Sections 1, 18 and 20 of Article I, Constitution of Oregon*." *Id*. at 611 (emphasis added).

Similarly, three decades later, this Court repudiated the rationale of the *Baker* and *Muller* decisions with respect to gender discrimination, holding that "when classifications are made on the basis of gender, they are *** inherently suspect" under Article I, section 20. *Hewitt v. SAIF*, 294 Or 33, 45, 653 P2d 970 (1982). And while the Court has not had occasion to consider the application of Article I, section 20, to physically and mentally disabled persons, there is no reason to doubt that this Court would now have an understanding of "equality," as applied to such persons, comparable to that of the U.S. Supreme Court. As noted above, that Court was able, less than 80 years ago, to reject summarily an equal protection argument made on behalf of mentally disabled persons (*Buck v. Bell*, *supra*, 274 US 200), but the Court in recent years has made it clear that the Equal

Protection Clause can be invoked by people with mental and physical disabilities to challenge governmental action that discriminates against them without a rational basis. *Tennessee v. Lane*, ___ US ___, 124 S Ct 1978, 1988, 158 LEd2d 820 (2004) ("classifications based on disability violate [the Equal Protection Clause] if they lack a rational relationship to a legitimate governmental purpose"); *City of Cleburne*, 473 US at 450 (ordinance that imposed special permit requirement for home for mentally disabled persons reflected "irrational prejudice" in violation of Equal Protection Clause).[8]

In short, it is beyond dispute that "contemporary legal (and moral) principles [have] emphatically repudiated" the "conception of equality" held by the framers of the Oregon Constitution. *Cox v. State of Oregon*, 191 Or App at 6-7 (2003) (Schuman, J., concurring). In the present case, the opponents of marriage equality are seeking to resurrect that mid-nineteenth century "conception of equality." They seek not merely to turn the clock back to the era when *Baker*, *Muller*, and *Paquet's Estate* represented the prevailing interpretation of Article I, section 20; rather, they seek to turn the clock back to 1857, to a time when the concept of "equality" under the law was reserved for white males. If the opponents of marriage equality have their way, the Oregon Constitution would provide limited means to sue the government if it were to discriminate based on race or gender, and laws barring interracial marriage and forbidding women from entering saloons and authorizing sterilization of mentally disabled persons would be permissible once again. In short, acceptance of DOMC's contention that the Court should recognize "historical exceptions" to

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[8] Here, as elsewhere in this brief, these *amici* cite U.S. Supreme Court decisions under the Fourteenth Amendment, not because they are controlling in the interpretation of Article I, section 20, but because they provide illustrative historical parallels, persuasive reasoning, or both, with respect to the development of Article I, section 20, jurisprudence. *See State v. Kennedy*, 295 Or 260, 267, 666 P2d 1316 (1983) ("when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so").

the guarantee of equality in Article I, section 20, would render that guarantee virtually meaningless for all minority groups.

DOMC attempts to limit the radical effect that its "historical exception" argument would have on the application of Article I, section 20, by contending that it is permissible to depart from the original understanding of the constitution with respect to race because "we have had the constitutional debate on race: Race no longer matters." (DOMC Brief at 25.) That argument is disingenuous, for the debates of the 1950s and 1960s have no bearing on the meaning of "equality" as it was understood by the delegates to the convention in 1857. *See Stranahan v. Fred Meyer, Inc*., 331 Or at 64-65 n 18 (events subsequent to adoption of constitutional amendment "are not relevant to ascertaining the people's intent when they adopted [the amendment]"). To the extent that DOMC's argument acknowledges that it was not the intent of the framers to enshrine their own notions of equality in Article I, section 20, these *amici* readily agree; but if it is DOMC's contention that the guarantees of Article I, section 20, should be limited by "historical exceptions" that might plausibly be thought to have been within the contemplation of the framers, then this Court would be required to overrule *Hewitt*, *Namba*, and virtually every other decision that has applied Article I, section 20, to any group other than adult white males.

By the same token, acceptance of DOMC's argument at the federal level would require reversal of a half-century of U.S. Supreme Court decisions under the Equal Protection Clause of the Fourteenth Amendment. While it is certainly true that there has been a virtually non-stop "constitutional debate" since the end of World War II over the meaning of "equal protection of the laws," none of that debate can disguise the fact that the history of the Fourteenth Amendment "rather clearly demonstrat[es] that it was not expected in 1866 to apply to segregation." Alexander M. Bickel, "The Original Understanding and

the Segregation Decision," 69 Harv L Rev 1, 64 (1955). If the "original understanding" of the Equal Protection Clause still prevailed, the schools and other institutions of public life in this country would still be segregated by race, and the Japanese exclusion case, *Korematsu v. United States*, 323 US 214, 65 S Ct 193, 89 LEd2d 194 (1944), would be read today as an exemplary application of that Clause, rather than as "a case that has come to live in infamy."[9]

But there are surely few people in the United States who believe that the constitutional guarantee of equal treatment under the law, whether found in the United States Constitution or the constitution of any state, should be limited to the conception of "equality" that prevailed in the 1850s and 1860s. Few would disagree with the Court's statement that:

> "[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality *** . *** Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Harper v. Virginia State Board of Elections*, 383 US 663, 669, 86 S Ct 1079, 16 LEd2d 169 (1966) (emphasis in original).

Accord, *Oregon v. Mitchell*, 400 US 112, 139-40, 150, 91 S Ct 260, 27 LEd2d 272 (1970) (separate opinions of Douglas, J., and of Brennan, White, and Marshall, JJ.) (framers of Fourteenth Amendment "understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations").

It was for these reasons that Professor Bickel believed that even though the *Brown* decision was not justified by the "original understanding," it *was* justified by the language of

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[9] Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 631 n 4 (14th ed 2001).

the Equal Protection Clause. Bickel wrote that there was "an awareness on the part of [the Framers of the Amendment] that it was a constitution that they were writing, which led to a choice of language capable of growth." Bickel, *supra*, at 63. Bickel concluded that "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866." *Id*. at 65.

More than 80 years ago, Justice Holmes observed:

> "*** [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of out whole experience and not merely in that of what was said a hundred years ago." *Missouri v. Holland*, 252 US 416, 433, 40 S Ct 382, 64 L Ed 641 (1920).

This Court has adopted that same view of the Oregon Constitution. Almost a century ago, in one of the decisions rejecting a challenge to gender discrimination under Article I, section 20, this Court quoted with approval the following passage from the Washington Supreme Court:

> "'Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government.'" *State v. Muller*, 48 Or at 257, quoting *State v. Buchanan*, 70 P 52, 54 (Wash 1902).

Nowhere in constitutional law does that principle have a stronger application than in the evolving concept of equality. There is no doubt that the 60 white men who met in Salem in 1857 did not intend to create "equal rights" for women or for African Americans or for Native Americans or for Asian Americans or for mentally disabled persons, but no one

would deny the observation of the U.S. Supreme Court, in rejecting an argument made by the State of Texas "that there are only two classes — white and Negro — within the contemplation of the Fourteenth Amendment," *Hernandez v. Texas*, 347 US 475, 477, 74 S Ct 667, 98 L Ed 866 (1954), that:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." *Id*. at 478.

The Oregon experience bears that out. The delegates to the Oregon constitutional convention did not intend that the guarantee of equal privileges and immunities in Article I, section 20, would be forever defined solely by their own conception of "equality." This Court's decisions in *Namba* and *Hewitt* properly demonstrate that the fact that the delegates in 1857 shared a concept of equality that was the product of a particular time and place cannot prevent the Court from applying the literal language of the Constitution for the protection of groups other than the white males whom the delegates intended to be the principal beneficiaries of Article I, section 20.

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IV. CONCLUSION

These *amici* urge the Court to affirm the trial court's judgment that Oregon's marriage statutes violate Article I, section 20, and to reverse that portion of the judgment that declares that the State can remedy that violation by creating some type of "separate but equal" category that would ostensibly provide a measure of formal equality between opposite-sex and same-sex couples but that would stigmatize same-sex couples as second-class citizens, unworthy of full participation in the status of marriage.

DATED: October 20, 2004.

Respectfully submitted,

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Attorneys for Civil Rights and Historians *Amici Curiae*

APPENDIX: IDENTITY AND INTEREST OF AMICI

The following groups and individuals have asked to be included as *amici* on this brief.

OREGON ORGANIZATIONS

1. Oregon Minority Lawyers Association.

OMLA is committed to making the legal community of Oregon a welcoming environment where people of all colors, races and ethnic backgrounds can excel academically, professionally and personally. Among OMLA's purposes are to promote fair and just treatment of all people under the law and to educate its members, the public and the legal profession about issues affecting people of color.

2. Oregon Chapter of the National Bar Association

OC-NBA's primary objective is to increase the number of African-American attorneys and promote diversity in Oregon's legal community

3. Asian Pacific American Network of Oregon.

APANO is a network of community leaders, activists and allies from Oregon's Asian/Pacific Islander communities. Its mission is to mobilize the social, cultural and political strengths of the many diverse Asian/Pacific Islander communities.

4. Korean American Citizens League

KACL is a civil rights organization working to secure the rights of the Korean American community and of all minority communities through education and empowerment. Its purposes include educating members of the community about their rights and privileges and promoting and securing civil rights.

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5. Urban League of Portland

The Urban League of Portland helps empower African Americans and others to achieve equality in education, employment and economic security.

6. Oregon Advocacy Center

The mission of the Oregon Advocacy Center is to promote and defend the rights of individuals with disabilities.

7. Oregon Chapter of American Immigration Lawyers Association

AILA is a national association of over 8,000 attorneys and professors established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. The Oregon Chapter of AILA has over ninety members who represent the interests of thousands of U.S. families and employers, as well as visitors, foreign students and asylum seekers fleeing persecution.

8. CAUSA

CAUSA is a statewide coalition of more than 50 labor, business, education, and advocacy organizations that promotes the civil rights and welfare of immigrants.

9. Latino Network

Latino Network brings together individuals and community organization to advocate for the Latino community, to educate and inform public policy, and to serve as a force for social change.

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JOINT OREGON/NATIONAL ORGANIZATION

10. Japanese American Citizens League

The Japanese American Citizens League ("JACL"), founded in 1929, is the nation's largest and oldest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese Ancestry and others. Its Portland, Oregon chapter was a charter chapter of the national organization. It vigilantly strives to uphold the human and civil rights of all persons. Since its inception, JACL has opposed the denial of equal protection of the laws to minority groups. In 1967, JACL filed an *amicus* brief in *Loving v. Virginia*, urging the Supreme Court to strike down Virginia's miscegenation laws, and contending that marriage is a basic civil right of all persons. In 1994, JACL became the first non-gay national civil rights organization, after the ACLU, to support same-sex marriages, affirming marriage as a fundamental human right that should not be barred to same-sex couples. Knowing the harm caused by discrimination and the importance of seeking equality and protecting the rights of all people, regardless of race, national origin, sex, age, disability, religion or sexual orientation, JACL continues to work actively to safeguard the civil rights of all Americans.

NATIONAL ORGANIZATIONS

11. Southern Poverty Law Center

Founded in 1971 and located in Montgomery, Alabama, the Southern Poverty Law Center has litigated numerous civil rights cases on behalf of women, minorities, and other victims of discrimination.

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12. Asian American Legal Defense and Education Fund

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF throughout its long history has supported equal rights for all people including the rights of gay and lesbian couples to marry.

13. Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. Securing non-discriminatory access to public benefits, including government-issued licenses, is a goal in several of MALDEF's substantive program areas.

14. The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan organization. Its mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy advocacy and community education on discrimination issues. NAPALC was an *amicus* in support of plaintiffs in Goodridge v. Dep't of Public Health, 440 Mass 309 (2003), and the question presented by this case is similarly of great interest to NAPALC because it implicates the availability of civil rights protections for Asian Pacific Americans in this country.

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INDIVIDUALS

15. Peggy Pascoe

Professor Peggy Pascoe teaches history at the University of Oregon, where she holds the Beekman Chair of Northwest and Pacific History. An expert on the history of race, gender, and sexuality, she has published award-winning articles on the history of miscegenation laws in the U.S. West and is currently completing a book on the significance of miscegenation laws in American history.

16. Jim Hill

Hill is a former Assistant Attorney General, a former member of the Oregon Senate and House of Representatives, and former State Treasurer. He is a long-time advocate for the expansion of civil rights protections and equal treatment under the law for all persons, regardless of their sexual orientation.

17. Margaret Carter

Carter is an Oregon State Senator. She was the first African American woman elected to the Oregon Legislative Assembly (1984), and has been a long-time advocate for equal protection for all groups. She is a member of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System Implementation Committee; former Board member, Portland Chapter of the NAACP; and Immediate Past President & CEO of the Urban League of Portland. She was author of the Oregon Anti-Apartheid Act of 1987.

18. Avel Louise Gordly

Gordly is an Oregon State Senator who has worked for many years on issues of social justice and equality under the law.

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19. Serena Cruz

Cruz has been a Multnomah County Commissioner since 1999. She is a strong advocate for social justice, particularly with respect to equal treatment under the law for the Latino community and other communities of color. She has worked to expand civil rights by supporting the expansion of the Civil Rights Ordinance, a Domestic Partnership registry and same sex marriage.

20. Maria Rojo de Steffey

Rojo de Steffey has been a Multnomah County Commissioner since 2001. She has worked for many years on issues of social justice and equality under the law.

21. Julie Novkov

Julie Novkov is Associate Professor of Political Science and Director of the Women's and Gender Studies Program at the University of Oregon. One of her areas of particular expertise is the history and development of laws relating to miscegenation.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused to be filed the foregoing **BRIEF OF CIVIL RIGHTS AND HISTORIANS *AMICI CURIAE*** on October 20, 2004, by mailing the original and 15 copies thereof by United States Postal Service first-class mail to:

State Court Administrator
Supreme Court Building
Records Section
1163 State Street
Salem, OR 97301-2563

I further certify that I caused to be served the foregoing **BRIEF OF CIVIL RIGHTS AND HISTORIANS *AMICI CURIAE*** on October 20, 2004, by mailing two copies thereof by United States Postal Service first-class mail to:

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