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 DOYLE; DONNA POTTER and PAMELA MOEN; DOMINICK VETRI and DOUGLAS DEWITT; SALLY SHEKLOW and ENID LEFTON; IRENE FARRERA and NINA KORICAN; WALTER FRANKEL and CURTIS KIEFER; JULIE WILLIAMS and COLEEN BELISLE; BASIC RIGHTS OREGON; and AMERICAN CIVIL LIBERTIES UNION OF OREGON, Plaintiffs-Respondents/ Cross-Appellants, 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 v. DEFENSE OF MARRIAGE COALITION; CECIL MICHAEL THOMAS; NANCY JO THOMAS; DAN MATES; and DICK JORDAN OSBORNE, Intervenors-Defendants-Appellants/ Cross-Respondents.	)	SC No. S51612 CA No. A124877 Multnomah County Circuit Court No. 0403-03057

October 2004

Brief of Amici Curiae
Oregon Gay and Lesbian Law Association
Equity Foundation, Inc.
Love Makes a Family, Inc.
Rural Organizing Project; Inc.
Cascade Aids Project
Parents and Friends of Lesbians and Gays, Oregon State Council
Parents Friends of Lesbians and Gays, Portland Chapter
in Support of Plaintiffs-Respondents/Cross Appellants

Appeal from the Judgment
of the Circuit Court of the State of Oregon
for the County of Multnomah

Honorable Frank L. Bearden, Judge

Beth A. Allen, OSB No. 96547
Lane Powell Spears Lubersky LLP
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: (503) 778-2100

Attorneys for Amici Curiae Oregon Gay and Lesbian Law Association; Equity Foundation, Inc.; Love Makes a Family, Inc.; Rural Organizing Project; Inc.; Cascade Aids Project; Parents and Friends of Lesbians and Gays, Oregon State Council; Parents Friends of Lesbians and Gays, Portland Chapter

Lynn R. Nakamoto, OSB No. 88087
Markowitz Herbold Glade & Mehlhaf PC
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204
Telephone: (503) 295-3085

Cooperating Counsel for ACLU Foundation of Oregon

Kenneth Y. Choe, Pro Hac Vice
American Civil Liberties Union Foundation
Lesbian and Gay Rights and AIDS Projects
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2553

Of Attorneys for Plaintiffs-Respondents/ Cross-Appellants Mary Li, Rebecca Kennedy, Stephen Knox, M.D.; Eric Warshaw, M.D.; Kelly Burke; Dolores Doyle; Donna Potter; Pamela Moen; Dominick Vetri; Douglas DeWitt; Sally Sheklow; Enid Lefton; Irene Farrera; Nina Korican; Walter Frankel; Curtis Kiefer; Julie Williams; Coleen Belisle; Basic Rights Oregon; American Civil Liberties Union of Oregon

Hardy Myers, OSB No. 64077
Mary H. Williams, OSB No. 91124
Richard D. Wasserman, OSB No. 79121
Michael C. Livingston, OSB No. 81297
Oregon Department of Justice
1162 Court Street, NE
Salem, OR 97301
Telephone: (503) 378-6002

Of Attorneys for Defendants-Appellants/ Cross-Respondents 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

Agnes Sowle, OSB No. 87348
Jenny Morf, OSB No. 98298
Office of the Multnomah County Attorney
501 SE Hawthorne Boulevard, Suite 500
Portland, OR 97214
Telephone: (503) 988-3138

Of Attorneys for Intervenor-Plaintiff-Respondent/Cross-Respondent Multnomah County

Kelly Clark, OSB No. 83172
Kristian Roggendorf, OSB No. 01399
O'Donnell & Clark, LLP
1706 NW Glisan, Suite 6
Portland, OR 97209
Telephone: (503) 306-0224

Herbert G. Grey, OSB No. 81025
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005
Telephone: (503) 641-4908

Kelly E. Ford, OSB No. 87223
Kelly E. Ford, PC
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005
Telephone: (503) 641-4908

Raymond M. Cihak, OSB No. 94560
Pamela Hediger, OSB No. 91309
Evashevski Elliott Cihak & Hediger, PC
PO Box 781
Corvallis, OR 97339
Telephone: (541) 754-0303

Kevin Clarkson, Pro Hac Vice
Brena Bell & Clarkson
310 K Street, Suite 601
Anchorage, AK 99501
Telephone: (907) 258-2000

Benjamin W. Bull, Pro Hac Vice
Jordan Lorence, Pro Hac Vice
Alliance Defense Fund
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260
Telephone: (480) 444-0020

Of Attorneys for Intervenors-Defendants-Appellants/Cross-Respondents Defense of Marriage Coalition; Cecil Michael Thomas; Nancy Jo Thomas; Dan Mates; Dick Jordan Osborne

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STATEMENT OF INTEREST

The plaintiffs in this case include gay men and lesbians who seek to be permitted to marry under Oregon's marriage laws. As the law now stands, these plaintiffs cannot marry the person of their choice, who, for each of these plaintiffs, is an individual of the same gender. Amici are groups and organizations that have as their core constituencies gay and lesbian people or their supporters.[1] Amici urge this Court to find that the opposite sex partner requirement in ORS 106.010 et seq., is unconstitutional because it denies gay men and lesbian people the privileges and immunities of marriage on the basis of their sexual orientation.

QUESTION PRESENTED

Whether Article I, section 20 requires suspect classification and heightened scrutiny be given to ORS 106.010 et. seq., which provide the privileges and immunities of marriage to citizens with a heterosexual orientation while denying those same privileges and immunities to gay and lesbian citizens.

PROPOSED RULE OF LAW

Suspect classification and an exacting, heightened scrutiny must be applied to government action that provides privileges and immunities to heterosexuals while denying those same privileges and immunities to gay men and lesbians.

ARGUMENT

I. INTRODUCTION.

On March 3, 2004, hundreds upon hundreds of gay and lesbian couples waited in line at the Multnomah County Clerk's office in the pouring rain for hours to be handed a document that had previously been denied to them—a marriage license. In the few weeks

[1] Individual statements of amici are attached as Appendix 1.

before the lower court's order enjoined the state from granting marriage licenses to any more gay and lesbian couples, approximately 3,000 gay and lesbian couples married. The plaintiff couples, representing these 3,000 couples and the many more gay and lesbian couples who still wish to marry, now come to this Court to affirm the trial court's ruling that the denial of the privilege and immunity of marriage violates Article I, section 20, and to ask the Court to open the doors of justice to gay and lesbian citizens who wish to enter into state sanctioned marriages.

Although this Court has not specifically articulated a "level of scrutiny" to be applied to laws affecting gay and lesbian people, it has enunciated an Article I, section 20 jurisprudence that requires heightened scrutiny to be applied to governmental action "that disfavors a class that has experienced a history of prejudice based on stereotypes".[2] Thus, the question whether Article I, section 20 requires greater scrutiny to be given to the plaintiffs when interpreting ORS 106.010 et. seq., which provide privileges and immunities of marriage to heterosexuals while denying those same privileges and immunities to gay men and lesbians, must be answered with a resounding "Yes."

II. UNDER ARTICLE I, SECTION 20, OREGON'S MARRIAGE LAWS UNCONSTITUTIONALLY DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION.

A. Introduction of Article I, Section 20 Analysis.

Marriage constitutes a "privilege" and "immunity." This brief concerns only whether the denial to plaintiff couples—and all gay men and lesbians—the right to marry violates the Oregon constitution. Specifically, this brief considers the appropriate analysis this Court should use given that the disfavored class at issue is gay men and lesbians or, said

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[2] *Hewitt v. State Accident Ins. Fund Corp.*, 294 Or 33, 46, 653 P2d 970, 977–78 (1982).

another way, given that the marriage laws impermissibly favor heterosexuals over gay men and lesbians.

This Court has formulated a two-step inquiry to determine whether government action unlawfully discriminates against a person based on his or her membership in some class. The first inquiry is whether the class is a "true" class. A true class is one that exists independently of the law and is widely recognized as forming the basis of a socially meaningful classification, based on characteristics such as legitimacy, gender, ethnic background, or geographic residence.[3] In contrast, a *de jure* class is one that is established by the law itself.[4]

If the class involved is a true class, then the second inquiry is whether the classification is suspect or not suspect.[5] If the classification is based on traits that are not the subject of prejudice or stereotypes, then the Court will review the government action to determine whether the classification scheme has a "rational basis."[6] If the classification is based on traits that are the subject of invidious discrimination or unexamined stereotypes, then the classification is "suspect" and the Court will engage in a heightened review of the classification scheme.[7]

Gay men and lesbians are members of a true class and have been the victims of invidious discrimination and unexamined stereotypes. To the extent that immutability is an essential characteristic of a suspect trait, sexual orientation is immutable, as that term has

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[3] *State v. Clark*, 291 Or 231, 240, 630 P2d 810 (1981).

[4] *Id*.

[5] *Sherman v. Dept. of Revenue*, 335 Or 468, 474 n 5, 71 P3d 67 (2003) (citing *Crocker v. Crocker*, 332 Or 42, 55, 22 P3d 759, 766 (2001)).

[6] *Crocker v. Crocker*, 332 Or 42, 55, 22 P3d 759, 766 (2001).

[7] *Hewitt*, 294 Or at 45–46.

implicitly been defined in the law. Accordingly, the Court must engage in a heightened review of the marriage statutes. Under such scrutiny, it is plain that the laws excluding gay men and lesbians from the privilege and immunity of marrying an otherwise qualified same-sex partner of their choice violate Article I, section 20 of the Oregon constitution.

B. The Marriage Statutes Limit Marriage Based on Sexual Orientation.

Some would argue that the marriage statutes do not favor heterosexuals—the statutes prefer only certain conduct, i.e., choosing to enter into an intimate relationship with a person of the same sex. However, the conduct of choosing to enter into an intimate relationship with a person of the opposite sex is the essential characteristic of heterosexuals as a class. When heterosexuals fall in love, they fall in love with a person of their opposite gender. When they wish to marry, they wish to marry someone of their opposite gender. When gay men and lesbian fall in love, they fall in love with a person of their own gender. When they wish to marry, they wish to marry someone of their own gender. These simple truisms demonstrate that it is the status of being gay or lesbian that defines the class that is excluded from the privilege and immunity of marriage.

By defining who can get a marriage license by reference to the essential characteristic of heterosexuals, the Oregon marriage statutes bestow the privileges and immunities of marriage upon heterosexuals. There can hardly be more palpable favoritism towards a class than making the conduct that defines the class a requirement of receiving a privilege or immunity. This favoritism is exactly what Article I, section 20 was intended to prohibit.

Courts have found it impossible to separate behavioral and descriptive characteristics of a class from the class itself. For example, in the recent U.S. Supreme Court case

Lawrence v. Texas,[8] the state of Texas asked the Supreme Court to analyze whether the state could criminalize intimate same-sex relationships and to ignore the fact that intimate same-sex relationships is the essential characteristic of gay men and lesbians as a class.[9]

In her concurrence, Justice Sandra Day O'Connor repudiated Texas' argument "that the sodomy law [did] not discriminate against homosexual persons. * * * only against homosexual conduct."[10] In rejecting Texas' argument, she wrote, "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[11]

The truth of this can be demonstrated by considering Texas' law in reverse: if intimate relationships between members of the opposite sex were outlawed, heterosexuals would be the affected class, as the conduct prohibited would reflect the essential characteristic of heterosexuals. Likewise, if marriage between opposite sex partners were prohibited, the conduct prohibited by the law would be conduct so closely correlated with being heterosexual that it could not be argued that it was anything other than a law targeting heterosexuals as a class.

The Oregon Attorney General's office has also recognized that the current Oregon marriage statutes discriminate against gay men and lesbians, not "conduct." In a letter to the Governor, he stated, "[i]t is unquestionably true that the exclusion of same sex couples from

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[8] 539 US 558, 123 S Ct. 2472, 156 L Ed 2d 508 (2003).

[9] *Id.*, oral argument transcript at 28 (March 26, 2003) (arguing in oral arguments before the Supreme Court that "we're * * * not penalizing * * * their status [as homosexuals]. We're penalizing only the particular activity that those unmarried couples may have with respect to whether they have sexual intimacies."), available at http://supremecourtus.gov/oral_arguments/ argument_transcripts/02-102.pdf.

[10] *Id.* at 583.

the privilege of marriage and its legal incidents primarily disadvantages homosexual persons."[12] The letter went on to acknowledge that "only homosexual persons are denied the opportunity to marry the person of their choice *by the law*."[13]

Like the U.S. Supreme Court and the Oregon Attorney General, this Court should reject any "conduct only" argument as a transparent attempt to allow discrimination against the class of people defined by that conduct. Otherwise, all Article I, section 20 protections could be circumvented by using descriptive characteristics instead of plain language labels. Because Oregon's marriage statutes require conduct that reflects the essential characteristic of heterosexuals—intimate relationships with persons of the opposite sex—in order to obtain the privilege and immunity of marriage, they grant the privilege and immunity of marriage on the basis of sexual orientation and favor the class of individuals who have a heterosexual orientation, while excluding those with a homosexual orientation.

C. ORS 106.010 et seq. Impermissibly Favor Heterosexuals and Discriminate Against Gay Men and Lesbians.

1. Gay men and lesbians constitute a "true class."

To determine whether gay men and lesbians are a "true" class, they must share "characteristics which they have apart from the law in question."[14] The sexual orientation of a person exists completely separate from the marriage statutes in that a person's sexual orientation is not created by these statutes or any other statute. The Oregon Attorney General recognized sexual orientation as a "true" class under Article I, section 20 because it

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(…continued)

[11] *Id*.

[12] Letter from Hardy Myers, Oregon Attorney General, to Governor Ted Kulongoski (March 12, 2004).

[13] *Id*. (emphasis in original).

[14] *Clark*, 291 Or at 240.

is a personal characteristic that exists "independent of the marriage statutes.[15] The Oregon legislature has recognized "sexual orientation" along with other true classifications, such as race, religion, and national origin, in statutes governing areas such as criminal law,[16] public safety records,[17] state employment actions,[18] and local subdivisions of the state.[19] The classification existed entirely apart from the laws.

This Court has also recognized gay men and lesbians as an identifiable class when discussing statutes, regulations, or ballot measures that use terms such as "sexual orientation" and "homosexuality."[20] For example, it has examined ballot measures that concerned "sexual orientation" or "homosexuality" for the purpose of determining whether they discriminated against gay men and lesbians[21] and recognized that they were in fact designed to treat gay men and lesbians differently from heterosexuals.[22]

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[15] Letter from Hardy Myers, Oregon Attorney General, to Governor Ted Kulongoski (March 12, 2004).

[16] ORS 166.155, 166.165 (2003).

[17] ORS 181.550 (2003).

[18] ORS 236.380 (2003).

[19] ORS 659.870 (2003).

[20] *E.g.*, *State v. Dilts*, 336 Or 158, 162, 82 P3d 593, 595 (2003), *overruled for other reasons by Dilts v. Oregon*, 124 S Ct 2906 (2004) (discussing Oregon sentencing guidelines that lists acts "motivated entirely or in part by the* * * sexual orientation of the victim" as an aggravating factor); *Lewis v. Keisling*, 320 Or 13, 15, 879 P2d 857, 858 (1994) (discussing a ballot measure designed to "amend the Oregon Constitution" to prohibit "state and local governments from creating classifications based on homosexuality," "sexual orientation," or "domestic partnerships" and from granting "marital status or spousal benefits on the basis of homosexuality").

[21] *E.g.*, *Mabon v. Kulongoski*, 322 Or 65, 71, 902 P2d 1171, 1173 (1995) (discussing a ballot measure to amend the Oregon constitution to forbid "laws that guarantee equal treatment for homosexual persons"); *Rooney v. Kulongoski*, 322 Or 77, 81, 902 P2d 1177, 1179 (1995) (discussing a ballot measure to amend the Oregon constitution to state that Oregon is "morally opposed" to homosexuality, to ban homosexuals from receiving marital status, and to restrict all books in public libraries that "promote or express approval of homosexuality"); *Baker v. Keisling*, 312 Or 8, 11, 815 P2d 698, 699 (1991) *(per curium)* (discussing a ballot measure to amend the Oregon constitution to declare "pedophilia,

(continued on next page…)

Therefore, gay men and lesbians constitute a true class separate and apart from the statutes concerning them.

2. Laws granting privileges and immunities based on sexual orientation are subject to suspect classification analysis.

This Court has never addressed whether laws that distinguish on the basis of sexual orientation are reviewed using a deferential "rational review" analysis or whether they must be reviewed with heightened scrutiny under a suspect classification analysis. But this Court's jurisprudence concerning laws drawing distinctions on the basis of gender provides controlling guidance. We start with a review of that jurisprudence.

a. The history of gender discrimination analysis.

In 1907, this Court recognized women as a true class, but did not scrutinize the gender-specific law at issue with any suspicion.[23] The case arose over a state law that forbade unaccompanied females, but not unaccompanied males, under 21 from being in a saloon or other place where intoxicating liquor was sold.[24] Despite concluding that women constituted a true class, the court upheld the law, stating, "[b]y 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."[25] Using a rational basis-type analysis, the court concluded that "[t]he vicious tendency of the mingling of men and women in saloons, or

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(…continued)
sadism, masochism, homosexuality, bestiality and necrophilia as 'abnormal, unnatural and perverse conduct' harmful to Oregon").

[22] *Rooney*, 322 Or at 82.

[23] *State v. Baker*, 50 Or 381, 386, 92 P 1076, 1077 (1907) (*overruled by Hewitt*).

[24] *Id*. at 383.

[25] *Id*. at 385–86.

places where intoxicating liquors are sold, is regarded as harmful to good morals, and therefore a law which prohibits * * * a female to enter a saloon and there be served with liquors is not unconstitutional."[26]

Fortunately, times—and this Court's jurisprudence—have changed. In 1982, in *Hewitt v. State Accident Insurance Fund,*[27] this Court began scrutinizing laws distinguishing on the basis of gender using a suspect classification analysis.[28] *Hewitt* involved a state workers' compensation statute that gave unmarried women the right to compensation for an injury to the unmarried man with whom she cohabited for one year when at least one child resulted from the cohabitation; however, the statute did not provide equal rights for a similarly situated unmarried man.[29] The Court did not require that one gender be advantaged over the other, rather it viewed the statute as granting and denying privileges to both genders "solely on the basis of gender."[30] *Hewitt* held that, although there might be an articulable reason for treating one class of people differently from another, government action is presumptively in violation of Article I, section 20 when it discriminates against a classification that is "suspected of reflecting 'invidious' social or political premises, that is to say, prejudice or stereotyped prejudgments."[31]

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[26] *Id*. at 385.

[27] 294 Or 33, 653 P2d 970 (1982).

[28] *Id*. at 45–46.

[29] *Id*. at 35.

[30] *Id*. at 42–43 (stating that the statute "grants an economic privilege to certain women who have cohabited with men and produced [offspring], while withholding such benefits from men," and on the flip side "grants * * * certain working men the privilege of providing benefits * * * to keep their family unit intact following accidental death but withholds the same benefit from working women").

[31] *Id*. at 45–50.

b. The focus of *Hewitt* is pernicious and unwarranted stereotyping leading to prejudice against a class.

This Court's focus in *Hewitt* was on the role that prejudice and stereotypes have played in the treatment of a disadvantaged class. While the word "immutable" appears only once in the *Hewitt* opinion,[32] the word "stereotype" (or some derivation of it) appears six times.[33] The word prejudice appears twice.[34] Language that speaks of how others treat the disadvantaged class appears often. For example, the court noted as factors in determining the suspicious nature of the classification at issue:

- Prejudice or stereotyped prejudgments.
- Invidious social or political premises.
- Unexamined societal stereotypes and prejudices.
- Bears no relation to ability to contribute to or participate in society.
- Historical, legal, economic, and political unequal treatment.
- Personal roles assigned because of membership in the class and no other reason.
- Archaic and overbroad generalizations.

This Court focused on whether prejudice and stereotypes were the underpinning for the gender distinction in the law at issue. In determining whether gender-based laws violated Article I, section 20 this Court observed that gender "bears no relation to ability to contribute to or participate in society. It noted that the purposeful historical, legal, economic and political unequal treatment of women is well known."[35] On that basis, this Court held that "when

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[32] *Id.* at 45.

[33] *Id*. at 37, 41, 45–46.

[34] *Id*. at 45–46.

[35] *Id*. at 46.

classifications are made on the basis of gender, they are, like racial, alienage and nationality classifications, inherently suspect."[36]

Unlike its decision 75 years hence, this Court was not persuaded that "stereotypical" gender roles was sufficient justification for gender classification. In *Hewitt*, it held that a law distinguishing on the basis of gender is suspect when it is based on "personal characteristics or social roles * * * assigned to men or women because of their gender and for no other reason. That is exactly the kind of stereotyping which renders the classification suspect in the first place."[37]

The evidence is overwhelming that gay men and lesbians—like women and racial and ethnic minorities—historically have suffered, and today continue to suffer, broad-based adverse social stereotyping and discrimination in Oregon and nationwide. [38] This has forced gay men and lesbians to hide their sexual orientation for fear of familial and friendship rejection, loss of employment, and physical attacks. Even as more gay men and lesbians are open about their sexual orientation, this stereotyping and discrimination has made it very difficult, if not impossible, for them to participate fully and equally in civic life.

For these reasons, this Court must conclude that a classification of sexual orientation is suspect because it excludes gay men and lesbians from the privileges and immunities of the marriage laws.

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[36] *Id.*

[37] *Id.*

[38] Obviously a recitation of the entire history of discrimination against lesbians and gay men is beyond the scope of this brief. What follows is a summary intended to capture in broad strokes the forms that such discrimination has taken.

(1) Gay men and lesbians are disadvantaged in society due to distinctions based on prejudice and stereotyping.

Being lesbian or gay bears no relation to an individual's actual ability to perform in or contribute to society. Yet, myths about sexual orientation have long prevailed in our society and have contributed greatly to the invidious discrimination lesbians and gay men experience. These myths link homosexuality with mental illness, child molestation, and a compulsive interest in sex rather than loving, family-centered relationships. The evidence disputing these pernicious stereotypes is overwhelming.

Although the odious myth persists, there is no link between homosexuality and child molestation.[39] Nor is there any evidence that being raised by a gay or lesbian parent has any negative effect on a child's healthy development. Indeed, the scientific research uniformly shows that children who have lesbian or gay parents are no different from other children with respect to their healthy development, i.e., in terms of their self-esteem, psychological well-being, cognitive functioning and social adjustment.[40]

Likewise, the idea that being lesbian or gay is only about sex, whereas being heterosexual is much more multi-faceted, stems from erroneous prejudice, not from any true difference between lesbians and gay men and heterosexuals. Most gay people, like most

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[39] *See, e.g.*, Carole Jenny et al., *Are Children at Risk of Sexual Abuse by Homosexuals?*, 94 Pediatrics 44 (1994) (finding that only 0.7 percent of child sex abusers are homosexual). *See also* John Boswell, *Christianity, Social Tolerance and Homosexuality* 16 (1980) (noting that accusations of child molestation have historically been made against disfavored minorities vulnerable to such "propaganda," be they gay people, Jews or others).

[40] *See, e.g.*, Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 161 (2001) (surveying the research); Child Welfare League of America, *CWLA Standards Regarding Sexual Orientation of Applicants*, and *CWLA Policy Regarding Adoption by Lesbian and Gay Individuals*, in Issues in Gay and Lesbian Adoption: Proceedings of the Fourth Annual Fierce-Warwick Adoption Symposium (Ann Sullivan ed.) (1995); Ellen C. Perrin et al., *Coparent or Second Parent Adoption by Same Sex Parents*, 109 Pediatrics 339 (Feb. 2002).

heterosexuals, desire stable, loving relationships. In a 2000 survey, 74 percent of lesbians and gay men said they would get legally married if they could, and more than one-quarter were living with a partner as if they were married.[41]

Sexual orientation has no bearing on a person's ability to perform in or contribute to society.[42] Both the American Psychiatric Association and the American Psychological Association have adopted resolutions stating that homosexuality is not correlated with any "impairment in judgment, stability, reliability or general social or vocational capabilities."[43] Therefore, "discrimination against homosexuals is 'likely * * * to reflect deep-seated prejudice rather than * * * rationality." [44] It is for that reason that any government action that discriminates against lesbians and gay men must be viewed with suspicion and submitted to an exacting examination.

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[41] *The Kaiser Family Foundation, Inside-OUT: A Report On The Experiences Of Lesbians, Gay men And Bisexuals In America And The Public's Views On Issues And Policies Related To Sexual Orientation* 4 (2001) (hereinafter "*KKF Study*"), available at http://kff.org/kaiserpolls/3193-index.cfm.

[42] This fact distinguishes sexual orientation from certain classes deemed non-suspect by the courts. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 US 432, 442, 105 S Ct 3249, 87 L Ed 2d 313 (1985) (mentally retarded not suspect class because, *inter alia*, they "have a reduced ability to cope with and function in the everyday world"); *see also Mass. Bd. of Ret. v. Murgia*, 427 US 307, 313, 965 S Ct 2562, 49 L Ed 2d 520 (1976) (individuals 50 or older not suspect class because, *inter alia*, they "have not * * * been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities").

[43] *American Psychiatric Association, Fact Sheet: Homosexual and Bisexual Issues* 2 (Feb. 2000), available at http://www.psych.org/public_info/homosexuall2.pdf.

[44] *Rowland v. Mad River Local School District*, 470 US 1009, 105 S Ct 1373, 84 L Ed 2d 392 (1985) (Brennan, J., dissenting from denial of certiorari; joined by Marshall, J.) (quoting *Plyler v. Dow*, 457 US 202, 216 n 14, 102 S Ct 2382, 72 L Ed 2d 76 (1982); *see Watkins v. U.S. Army*, 875 F2d 699, 725 (1989) (Norris, J., concurring in judgment; joined by Canby, J.) ("[the] irrelevance of sexual orientation to the quality of a person's contributions to society-suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes * * *").

(2) Prejudice and stereotyping has led to stigma, exclusion, and fear for personal safety.

Gay men and lesbians learn quickly that society holds negative stereotypes about them. In response, many gay men and lesbians attempt to conceal their sexual orientation in a variety of contexts in order to avoid stigma, discrimination, and violence.[45] In the 1950s, almost all gay people found that failing to hide their sexual orientation completely—from friends, family, and co-workers—could lead to horrifying consequences. Discrimination primarily took the form of exposing the sexual orientation of gay people and then harassing them and/or punishing them for their sexual orientation. For example, gay people—labeled "sex perverts"—were grouped with Communists as security risks.[46] In 1953, President Eisenhower issued an Executive Order calling for the dismissal of all lesbians and gay men, who were labeled "sex perverts" in the Order, from government employment.[47]

During this time, police commonly raided gay bars and arrested patrons. Frightened of publicity, victims rarely challenged any charges.[48] In addition, until 1965, gay men and lesbians aliens were excluded from admission into the United States as psychopaths under 8 USC § 1182(a)(4), and for many years after that, lesbians and gay male aliens were still excluded as "sexual deviants."[49]

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[45] In a 2000 survey, 45 percent of lesbians and gay men reported that they were not open about their sexual orientation to their employers; 28 percent were not open to co-workers, and 16 percent were not open to family members. *KFF Survey, supra,* n 37 at 2.

[46] Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va L Rev 1551, 1565 (1993).

[47] *Id*. at 1566 discussing Executive Order 10,450.

[48] *Id*. at 1565.

[49] Tracey Rich, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 Ga L Rev 773, 773 n 4 (1988); *see also Boutilier v. INS*, 387 US 118, 124 (1967) (upholding deportation because "Congress commanded that homosexuals not be allowed to enter").

Over the last 40 years, more and more gay people have refused to hide their orientation. Honesty, however, has brought targeted discrimination. In a 2000 survey, three out of four gay, lesbian, and bisexual respondents reported they had experienced prejudice and discrimination because of their sexual orientation.[50] Lesbians and gay men across the country have suffered employment discrimination in all types of workplaces, including schools, hospitals, and police departments.[51]

Whether or not they attempt to hide their sexual identity, gay and lesbian people are vulnerable to physical violence in this society. In the 2000 survey, one third of lesbian and gay respondents reported that they had been personally targeted for physical violence because of their sexual orientation.[52] Since the 1990s, Oregon law enforcement agencies have been required by law to report such crimes, as well as hate crimes committed against other classifications of citizens.[53] In 2001, the last year reported, of the seven specific classes of citizens tracked, crimes motivated by prejudice against gay men and lesbians is second only to those motivated by race and color.[54]

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[50] *KKF Study*, *supra*, n 37 at 3. *See also* U.S. Surgeon General, *The Surgeon General's Call to Action To Promote Sexual Health And Responsible Sexual Behavior § III* (2001) (hereinafter "*Surgeon General's Call to Action*") (reporting that American culture "stigmatizes homosexual behavior, identity and relationships"), available at http://surgeongeneral.gov/ library/sexualhealth/call.htm.

[51] *See, e.g*, *Weaver v. Nebo Sen. Dist.*, 29 F Supp 2d 1279 (D Utah 1998) (lesbian high school coach in Utah fired from job because of her sexual orientation); *DeSantis v. Pacific Tel.*, 608 F2d 327 (9th Cir 1979) (California telephone company discriminated against lesbian and gay operators); *Miguel v. Guess*, 51 P3d 89 (Wash App 2002) (lesbian x-ray technician at Washington state public hospital fired because of her sexual orientation); *Quinn v. Nassau County Police Dept.*, 53 F Supp 2d 347 (EDNY 1999) (gay New York police officer harassed because of his sexual orientation).

[52] *KFF Study*, *supra*, n 37 at 4.

[53] *See* ORS 181.550 (2003).

[54] Department of Oregon State Police, *Report of Criminal Offenses Motivated by Prejudice*, January through December 2001.

In that same year, the FBI reported 8,063 bias motivated crimes nationwide, approximately 16 percent of which targeted lesbians and gay men. [55] Moreover, studies have found that the bias murders of gay men and lesbians are characterized by "overkill," the use of "extraordinary violence such as multiple stab wounds, mutilation and dismemberment."[56] The serious social problem of anti-gay violence drew national attention in 1998 and 1999 after the gruesome bias murders of three men identified as gay by their murderers—Wyoming college student Matthew Shepard, Pfc. Barry Winchell, killed by a fellow soldier at Fort Campbell, Kentucky, and Billy Jack Gaither of Sylacauga, Alabama.[57]

(3) Lesbians and gay men are disadvantaged in the political arena.

Although in recent years a greater number of gay men and lesbians have become more willing to accept the risks visibility entails, a great number still conceal their sexual orientation, which has resulted in gay men and lesbians being deterred from political activism because they fear "expos[ing] themselves to the very discrimination they seek to eliminate."[58]

This paradox has meant that few "out" lesbians and gay men have been willing to serve in public office. Political gains, few and far between have often been met with devastating reversals and further deterioration of rights.

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[55] *Federal Bureau of Investigation, Hate Crime Statistics*, 2000, 7 (2001), available at http://fbi.gov/ucr/cius_00/hate00.pdf.

[56] Lori Rotenberk, *Study Links Homophobia, 151 Murders,* Chi. Sun-Times, Dec. 21, 1994, at 27.

[57] *See* Sue Anne Pressley, *2 Accused of Killing, Burning Gay Man,* Wash. Post, Mar. 5, 1999, at A01; *Soldier Sentenced to Prison - Man Pleads Guilty to Lesser Charge in Killing of Barracks Mate Rumored to be Gay,* Augusta Chron., Jan. 9, 2000, at A03.

[58] *Watkins*, 875 F2d at 727 (Norris, J., concurring in judgment; joined by Canby, J.).

Lesbians and gay men are virtually unrepresented in Congress, where only five openly lesbian or gay individuals have ever served.[59] There has never been an openly gay president or member of the Senate. Being "outed" generally means the end of a political career in federal and state politics.

Lesbians and gay men are also woefully underrepresented in this country's legislatures. In Oregon, only a total of three openly gay or lesbian legislators have ever served in the Oregon legislature. There currently are no openly gay or lesbian legislators and only one bisexual legislator. No openly gay or lesbian person holds a significant statewide executive branch position.

The Oregon legislature has rejected a bill that would have protected gay men and lesbians from discrimination in employment every biennium since it was introduced in the early 1970s. Had it not been for the Court of Appeals ruling in *Tanner v. Oregon Health Sciences University*,[60] many of the few, but important, protections currently enjoyed by gay and lesbian citizens of Oregon would not exist. Many regulations that confer important benefits on gay and lesbian families still fail to comport with the reasoning of *Tanner*.[61]

Some of the most overt forms of discrimination have found their way into federal law. This has included a complete ban prohibiting lesbians and gay men from serving in the military, to the more recent law prohibiting gay men and lesbians from serving if their sexual orientation becomes known. The federal Defense of Marriage Act denies all federal benefits to married same-sex couples and purports to allow states to avoid their obligation

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[59] *See* David Crary, *Openly Gay Politicians Remain Rare* (June 24, 2002), available at http://www.victoryfund.org/public/press/pressrelease.cfm?PressReleaseArticleID=50; Marcelo Vilela, *Out in Congress* (Feb. 28, 2000), at http://house.gov/frank/k_state.html.

[60] 157 Or App 502, 971 P2d 435 (1998).

[61] *E.g.*, OAR 125-160-0120; OAR 137-076-0010.

under the full faith and credit clause to recognize such marriages from other states.[62] The President of the United States has urged passage of an amendment to the United States Constitution that would enshrine discrimination against gay men and lesbian, and prevent any federal recognition of their marriages,[63] and Congress has taken up a proposal that would prevent federal courts from hearing certain cases involving the constitutionality of marriage for same-sex couples.[64]

Until recently many states criminalized intimate relationships of gay and lesbian couples. The U.S. Supreme Court allowed such discrimination when it decided *Bowers v. Hardwick*.[65] This stigmatized lesbians and gay men as criminals and allowed additional forms of discrimination against them. It took seventeen years for the Court to overrule *Bowers*, in *Lawrence*, stating "[i]ts continuance as precedent demeans the live of homosexual persons."[66]

Despite its clear precedence, some jurisdictions have diminished its importance in an attempt to continue discriminating against gay men and lesbians.[67] For example, in Florida, a gay male couple has not been permitted to adopt the child whom they have fostered since birth,

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[62] 28 USC § 1738C (2001).

[63] H.J. Res. 56, 108th Cong. (2003); S.J. Res., 108th Cong. (2003).

[64] H.R. 3313, 108th Cong. (2004).

[65] 478 US 186, 196, 106 S Ct 2841, 92 L Ed 2d 140 (1986) (*overruled by Lawrence v. Texas*).

[66] All of the federal case law holding that sexual orientation is not a suspect classification under federal constitutional law relies directly or indirectly on *Bowers* and is therefore now of questionable precedent. *Lawrence*, 539 US at 575 (overruling *Bowers*).

[67] *See Lofton v. Secretary of Dept. of Children and Family Services*, 358 F3d 804, 806 (2004) (upholding Florida's ban on "practicing homosexuals" from adopting by distinguishing right to adopt from right to engage in private sexual conduct).

once the child became "adoptable" after he sero-converted from HIV-positive to HIV-negative under the couple's care.[68]

In Oregon, the ballot initiative has been a weapon used to discriminate against lesbians and gay men. Oregon has seen twelve statewide and numerous municipal ballot initiative designed to politically disadvantage and morally condemn lesbians and gay men.[69] These ballot measures sought to allow unfettered discrimination towards lesbians and gay men and some compared homosexuality to pedophilia, sadism, masochism, bestiality, and necrophilia.[70] A constitutional amendment measure on the 2004 ballot would make it the policy of Oregon that only a man and a woman can marry, which demonstrates the persistence of the discrimination in Oregon.

Anti-gay and lesbian ballot measures are not unique to Oregon. In 1992, the people of Colorado amended their state constitution to prohibit gay men and lesbians from using the political and legal processes to redress discrimination against them.[71] The U.S. Supreme Court struck down Colorado's amendment and recognized that the ballot measure was motivated by animus towards gay men and lesbians.[72]

Some 38 states have passed statutes or approved constitutional amendments to prevent gay and lesbian couples from marrying and, in many instances, even from enjoying lesser forms of protections for themselves and their families. Voters by referenda in several states have enacted state statutes or approved constitutional amendments precluding judicial

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[68] *Id.* at 818–819.

[69] *See, e.g.*, *supra*, n 21 (giving examples of the many proposed ballot measures designed to allow overt discrimination and condemnation of homosexuality in Oregon).

[70] *Baker v. Keisling*, 312 Or at 11.

[71] *Romer v. Evans*, 517 US 620, 623–24, 116 S Ct 1620, 134 L Ed 2d 855 (1996).

[72] *Id.*

review of discrimination in marriage against lesbians and gay men.[73] Of course, this very case points to the history and continued discrimination against gay men and lesbians in Oregon.

In the rare instances where gay men and lesbians experience success in instituting protections of their rights, they are generally met with initiatives and referendums repealing those laws or ordinances and enacting legislation preventing them from any future successes.[74] This extraordinary use of the political process to strip the government of the power to protect an unpopular minority mirrors the backlash against the civil rights laws of the 1960s, which took the form of state constitutional amendments that prohibited, or created barriers to the enactment of, laws barring racial discrimination in housing.[75]

Finally, some forms of discrimination are subtle ways of telling lesbians and gay men that they are inferior. In 1999, the Supreme Court of Vermont allowed the Vermont Legislature to fashion a two-tiered system in which Vermont's lesbians and gay men who wish to marry must be joined in a second class union—a "civil union"—while their heterosexual counterparts continue to be permitted to enter into "marriage."[76] This discrimination sends a disparaging message to lesbians and gay men—you are not good enough to be considered equal before the state, the law, or society.

The fact that gay and lesbian citizens have had some success in the courts does not vitiate the need for extra care in the judicial review of laws that negatively affect them. Today

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[73] *See* Stephen Buttry & Leslie Reed, *Challenge is Ahead Over 416*, Omaha World-Herald, Nov. 8, 2000, at 1; Lambda Legal Defense & Education Fund, Hawaii, *Alaska Election Results Don't Stop Freedom to Marry Movement* (Nov. 4, 1998) at http://lambdalegal.org/cgi-bin/iowa/documents/ record?record=302.

[74] See, e.g., *Referendums in 3 States Seek to Thwart Gay Rights: Homosexuality Measures in Michigan, Florida and Texas Would Remove Protected Status and Deny Benefits*, L.A. Times, Nov. 4, 2001, at A38.

[75] *See Reitman v. Mulkey*, 387 US 369, 87 S Ct 1627, 18 L Ed 2d 830 (1967); *Hunter v. Erikson*, 393 US 385, 89 S Ct 557, 21 L Ed 2d 616 (1969).

women and racial, ethnic, and religious minority groups are protected from discrimination by state and federal laws.[77] Yet, laws discriminating on the basis of race continued to receive strict scrutiny under federal law after passage of a series of Civil Rights Acts, as well as widespread adoption of state anti-discrimination laws. Sex discrimination continues to receive heightened scrutiny under federal law after passage of Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and other federal laws prohibiting sex discrimination.[78]

The existence of these protections did not stop the United States Supreme Court from determining that discrimination on the basis of race and sex must be subjected to greater scrutiny. To the contrary, such protections constituted strong evidence that legislatures have acknowledged a history of purposeful unequal treatment.[79] Likewise, modest success for lesbians and gay men in the political arena does not alter the need to review laws affecting them with more exacting examination.

Popular and legislative political processes have generally failed to address violations of the civil rights of gay men and lesbians and has often been used to codify existing discrimination. This political disadvantage mandates that the exclusion of gay men and lesbians from the marriage laws is suspect and must be examined with heightened scrutiny.

(…continued)

[76] *Baker v. Vermont*, 744 A.2d 864 (1999).

[77] *See, e.g.*, 42 USC § 2000e (2001); ORS 659A. et. seq. (2003)

[78] *See, e.g., Frontiero v. Richardson*, 411 US 677, 687–88, 935 S Ct 1764, 36 L Ed 2d 583 (1973) (plurality opinion).

[79] *See, e.g., id.* (citing anti-discrimination legislation in support of conclusion that classifications based on gender must be subjected to heightened scrutiny). In sharp contrast to these protections, no federal law expressly prohibits employment discrimination based on sexual orientation, and such discrimination remains lawful in the vast majority of state and local jurisdictions, including Oregon. *See* Human Rights Campaign, *Frequently Asked Questions on Sexual Orientation Discrimination,* http://www.hrc.org/worknet/nd/nd_facts .asp#3.

c. Suspect classification analysis in this case does not depend on whether sexual orientation is immutable.

Defense of Marriage Coalition ("DOMC") amici will likely argue that homosexuality is not immutable, and, therefore, a suspect classification analysis is not proper. (DOMC Br at 39.) First, that argument incorrectly assumes that immutability is required in all cases in which suspect classification analysis is employed. This assumption is not supported by this Court's case law. Second, that argument begs the question: what does "immutable" mean in the context of suspect classification analysis? Immutability does not have the inflexible meaning opponents of marriage equality would assert.

(1) Immutability is not a prerequisite to suspect classification review.

In *Hewitt*, this Court examined a large number of U.S. Supreme Court cases holding that gender is a quasi-suspect class and therefore subject to heightened scrutiny.[80] The Court recognized that "like the fourteenth amendment, article I, section 20, of the Oregon constitution prohibits disparate treatment of groups or individuals by virtue of 'invidious' social categories."[81]

The court raised "immutability"[82] as a consideration in Article I, section 20 analysis for the first time.[83] It mentioned the word immutable only once in the entire opinion: "[l]ike other

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[80] *Id*. at 39-45 (mentioning *Reed v. Reed*, 404 US 71 (1971*); Frontiero v. Richardson*, 411 US 677 (1973); *Craig v. Boren*, 429 US 190 (1976)).

[81] *Hewitt*, 294 Or at 43.

[82] In this section of this brief, the word "immutable" has the lay meaning of "not changeable," which presumably will be the meaning DOMC's *amici* will ascribe to it. As discussed later, this lay meaning of the word is not the meaning it has in the state and federal constitutional context.

[83] The U.S. Supreme Court also first used the term "immutable" when analyzing whether classifications based on gender should receive heightened scrutiny. *Frontiero*, 411 US at 686.

state and federal courts, we agree that a classification is 'suspect' when it focuses on 'immutable' personal characteristics."[84]

The court stated, immediately following: "[i]t can be suspected of reflecting 'invidious' social or political premises, that is to say, prejudice or stereotyped prejudgments."[85] The "it" in the sentence is the classification. Thus, if a classification is based on an "'immutable' personal characteristic," the classification can be suspected of reflecting prejudiced or stereotyped prejudgments about the class. Notably, this Court did not say that a classification is "suspect" *only* when it focuses on "immutable" personal characteristics. Rather, a class defined by an immutable characteristic is a suspect class.

This Court concluded that the fact that the grant or denial of a state privilege or immunity was based on such an intrinsic personal characteristic-gender, combined with the fact that that class had experienced invidious social and political discrimination based on prejudice and stereotyped prejudgments about the members of that class, rendered the classification suspect.

Notably, this Court, in *Hewitt*, also noted that gender is a "visible" characteristic.[86] However, clearly the visibility of a characteristic is not essential to the identification of a suspect class. For example, under this Court's case law, nationality and religion are suspect classes, but not visible or immutable characteristics. Clearly, not every factor identified in the Court's analysis in *Hewitt* is essential for a class to be deemed a suspect one.

In *Tanner v. Oregon Health Sciences University*, the Oregon Court of Appeals recognized that immutability was but one factor to consider in whether a classification is

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[84] *Hewitt*, 294 Or at 46.

[85] *Id*.

[86] *Id*.

suspect. It examined this Court's Article I, section 20 jurisprudence, including *Hewitt*, to determine whether "sexual orientation" was a "suspect class."[87] The Court of Appeals concluded that "immutability" was not a prerequisite for defining a suspect class because this Court had viewed two classes defined by intrinsic personal characteristics—alienage and religious affiliation—as "inherently suspect" or an "impermissible criteria" of classification.[88]

The Court of Appeals then considered the factors that were common to these classes and concluded that the test was whether the law adversely affected "socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice."[89] The court recognized that unmarried homosexual couples constituted a "true class" and stated that "[s]exual orientation, like gender, race, alienage, and religious affiliation is widely regarded as a defining a distinct, socially recognized group of citizens."[90] It found that it was "beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice," and held Article I, section 20 required equal treatment of heterosexual and homosexual couples.[91]

The Court of Appeals' analysis makes sense and comports with *Hewitt.* As discussed above, gay men and lesbians are a distinct socially-recognized group of citizens who are victims of pernicious and unwarranted social stereotyping and stigma. Laws that grant privileges and immunities based on sexual orientation are, therefore, "inherently suspect."

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[87] 157 Or App 502, 524, 971P2d 435 (1998).

[88] *Id*. at 522–23 (citing *Greist v. Phillips*, 322 Or 281, 300, 906 P2d 789 (1995) and *Salem College & Academy, Inc. v. Emp. Div*., 298 Or 471, 695 P2d 25 (1985)).

[89] *Id*.

[90] *Id*. at 523–24.

[91] *Id*. at 524–25.

Accordingly, such laws that must be reviewed with same level of scrutiny this court gave to gender in *Hewitt*.

(2) Immutability means that the trait is not easily changed or that the trait should not be expected to change because it is so central to an individual's identity.

If "immutability" is to be enshrined as an absolute prerequisite to protection under Article I, section 20, then it is necessary to determine what this Court means when it uses that term. Opposing amici are likely to point to dictionary definitions of "immutable" and ask the Court to rely on those definitions in this context. The analysis is not so simple. First, not surprisingly, the word "immutable" has different definitions in different dictionaries. The term, "immutable" has been variously defined in dictionaries as a characteristic "incapable of being changed,"[92] "unchangeable,"[93] "not capable or susceptible of change,"[94] and "not mutable; not subject to or susceptible of change."[95]

So, solely using the dictionary as a guide, immutability means something between "incapable of being changed" to "not susceptible to being changed." Opposing amici and DOMC would impute the former, more rigid definition. However, case law shows that "immutability" does not mean "unchangeable" in the constitutional context.

For example, in federal Equal Protection cases, "immutability" is losing its importance in determining whether or not a classification is "suspect." In *City of Cleburne v. Cleburne Living Center*, the U.S. Supreme Court held that "mental retardation" was not a suspect class,

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[92] Webster's Encyclopedic Dictionary 485 (1991).

[93] Webster's Encyclopedic Dictionary 485 (1991).

[94] Webster's Third New International Dictionary 1131 (1986).

[95] Oxford English Dictionary 1381 (compact ed. 1971).

despite the determination that the characteristic was immutable.[96] By contrast, the U.S. Supreme Court stated that illegitimacy is a suspect classification.[97] Yet a child can become "legitimate" by a later marriage of the mother and father.[98]

In dicta, in *Cleburne*, the U.S. Supreme Court suggested the analytical limitations of "immutability."[99] Following the U.S. Supreme Court's precedence in *Cleburne*, the Ninth Circuit issued a concurring opinion wherein homosexuals were found to be a suspect class.[100] The concurrence stated, "[i]t is clear that by 'immutability' the [U.S. Supreme] Court has never meant strict immutability in the sense that members of the class must be physically able to change or mask the trait defining the class."[101] More recently, the Ninth Circuit has concluded that "immutable" means that the characteristic that defines the group "either cannot change, or should not be required to change because it is fundamental to * * * individual identities or consciences."[102] Other courts have concluded that immutable means that the characteristic that

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[96] *Cleburne*, 473 US at 442.

[97] *Id*. at 441 (explaining that illegitimacy is a suspect classification because it is "beyond the individual's control"). *See also Hernandez-Montiel v. INS*, 225 F3d 1084, 1092 (9th Cir 2000) ("immutable" means that the characteristic that defines the group "either cannot change, or should not be required to change because it is fundamental to * * * individual identities or consciences").

[98] *See* OAR 333-011-0047(1); *see also Reed v. Campbell*, 476 US 852, 853, 106 S Ct 2234, 90 L Ed 2d 858 (1986) (discussing a Texas statute that legitimized children if the parents subsequently married).

[99] *Cleburne,* 473 US at 442 n 10. *See also id.* at 472 n 24 (Marshall concurring) (suggesting that immutability is only "relevant insofar as [it] point[s] to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs).

[100] *Watkins*, 875 US at 728 (Norris, J., concurring in judgment; joined by Canby, J.).

[101] *Id*. at 727 (Norris, J., concurring in judgment; joined by Canby, J.).

[102] *Hernandez-Montiel v. INS*, 225 F3d at 1092, 1093 (9th Cir 2000).

sets the class apart is one that is not easily susceptible to change or is so fundamental to one's identity that a person should not be required to abandon them.[103]

Likewise, immutability, in the Article I, section 20 context does not mean an absolute inability to change the class trait. In *State v. Buchholz*, this Court recognized religion as an "impermissible criteria" of classification.[104] In *Salem College & Academy, Inc. v. Employment Division*, this Court recognized that church affiliation an impermissible classification under Article I, section 20.[105] In light of those statements by the Court, it is apparent that, in the context of Article I, section 20 jurisprudence, certain characteristics are "immutable," even though they may be changeable.

Similarly, as the Court of Appeals noted in *Tanner*, women can become men and vice versa by undergoing sexual reassignment surgery.[106] The fact that women can undergo surgery to become men does not render their gender "mutable" in the Article I, section 20 sense, however. It simply means that citizens should not be required to change their sex because sex is fundamental to their individual identities or consciences.

One can change alienage by becoming an American citizen. One can change nationality by becoming a citizen of another country. Members of certain races and ethnic groups can "pass" as white or hide their national origin. But Article I, section 20 does not require such extreme measures to be entitled to the same privileges and immunities that people with another gender, religion, alienage, or nationality are entitled. Certainly this

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[103] *E.g., Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A2d 1, 34-35 (DC 1981); *Commonwealth v. Wasson*, 842 SW2d 487, 500 (Ky 1992); *Egan v. Canada*, 1995 Can Sup Ct, Lexis 34, 124 DLR (4th) 609.

[104] *See State v. Buchholz*, 309 Or 442, 446, 788 P2d 998, 1000 (1990).

[105] *Salem College & Academy, Inc. v. Employment Div.*, 298 Or 471, 495, 695 P2d 25, 37 (1985)

[106] *Tanner*, 157 Or App at 523.

Court would never hold that heterosexuals would have to prove their sexual orientation was immutable to secure privileges and immunities that discriminated against them on the basis of their sexual orientation.

Thus, immutability in the context of Article I, section 20 does not mean unchangeable. It means that the classification is so fundamental to one's sense of self that would be improper for the government to require one to change it in order to be entitled to the same privileges and immunities all others are entitled to receive.

Regardless of whether sexual orientation can be changed—which it cannot, as discussed below—it is so fundamental to one's sense of self that it would be improper for the government to require one to change it to be entitled to certain privileges and immunities.

(3) Sexual orientation is sufficiently immutable to trigger "suspect class" analysis.

Even if this Court were to conclude that only personal characteristics that are not susceptible to change trigger suspect classification analysis, sexual orientation would still trigger suspect classification analysis because it is a personal characteristic that is not susceptible to change.[107] Although the origins of sexual desire are not fully known, there is consensus that a person's sexual orientation, homosexual or heterosexual, cannot be changed either by a simple decision-making process or by medical intervention.[108] Indeed, as the Seventh Circuit has noted, "[i]t [seems] dubious * * * that someone would choose to be homosexual, absent some genetic predisposition, given the considerable discrimination

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[107] *Id.*

[108] *See, e.g.*, *American Psychiatric Association*, *supra*, n 64 at 1 ("[t]here is no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation"); *Surgeon General's Call to Action*, *supra*, n 42 at § III ("[t]here is no valid scientific evidence that sexual orientation can be changed").

leveled against homosexuals."[109] No matter how "immutable" is defined, sexual orientation is an immutable, defining personal characteristic.

CONCLUSION

It has been said that this nation "neither knows nor tolerates classes among citizens."[110] Yet this nation has historically and continually known, tolerated, and instituted discrimination against lesbians and gay men.

That discrimination continues in Oregon in the form of denying the privileges and immunities of marriage to gay men and lesbians on the basis of their sexual orientation. Because the classification at issue is based on sexual orientation, the proper level of scrutiny of the marriage laws is an exacting, heightened one. This is so because gay men and lesbians have experienced a history of prejudice based on stereotypes. Because there is no constitutionally sufficient justification for treating lesbian and gay couples differently than heterosexual couples, the marriage laws violate the privileges and immunities clause of the

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[109] *Nabozny v. Podlesny*, 92 F3d 446, 457 n 10 (7th Cir 1996); *see also Watkins*, 875 F2d at 726 (Norris, J., concurring in judgment; joined by Canby, J.) (concluding that the theoretical mutability of sexual orientation does not present an obstacle to recognizing gay men and lesbians as a suspect class after posing the following thought experiment: "[w]ould heterosexuals living in a city that passed an ordinance burdening those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?").

[110] *Romer*, 517 US at 623 (citing *Plessy v. Ferguson*, 163 US 537, 559 (1869), (Harlan, J., dissenting), *overruled by Brown v. Board of Education of Topeka*, 347 US 483, 74 S Ct 686, 98 L Ed 873 (1954)).

Oregon constitution. Therefore, this Court should affirm the holding of the trial court that ORS 106.010 et seq. violates Article I, section 20 and remedy that violation by extending the right to marry to gay and lesbian couples.

Respectfully submitted,

LANE POWELL SPEARS LUBERSKY LLP

By:_____
Beth A. Allen

Attorneys for Amici Curiae Oregon Gay and Lesbian Law Association; Equity Foundation, Inc.; Love Makes a Family, Inc.; Rural Organizing Project; Inc.; Cascade Aids Project; Parents and Friends of Lesbians and Gays, Oregon State Council; Parents Friends of Lesbians and Gays, Portland Chapter

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing amicus curiae brief on October 14, 2004, by causing the original and 15 copies thereof to be mailed by First Class Mail on that date to the State Court Administrator for the State of Oregon, and that I served the same on October 14, 2004, by causing two true copies thereof to be mailed by First Class Mail on that date to the following addresses:

Lynn R. Nakamoto
Markowitz Herbold Glade & Mehlhaf PC
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204

Kenneth Y. Choe
American Civil Liberties Union Foundation
Lesbian and Gay Rights and AIDS Projects
125 Broad Street, 18th Floor
New York, NY 10004

Hardy Myers
Mary H. Williams
Richard D. Wasserman
Michael C. Livingston
Oregon Department of Justice
1162 Court Street, NE
Salem, OR 97301

Agnes Sowle
Jenny Morf
Office of the Multnomah County Attorney
501 SE Hawthorne Boulevard, Suite 500
Portland, OR 97214

Kelly Clark
Kristian Roggendorf
O'Donnell & Clark, LLP
1706 NW Glisan, Suite 6
Portland, OR 97209

Herbert G. Grey
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005

Kelly E. Ford
Kelly E. Ford, PC
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005

Raymond M. Cihak
Pamela Hediger
Evashevski Elliott Cihak & Hediger, PC
PO Box 781
Corvallis, OR 97339

Kevin Clarkson
Brena Bell & Clarkson
310 K Street, Suite 601
Anchorage, AK 99501

Benjamin W. Bull
Jordan Lorence
Alliance Defense Fund
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260

_____

Beth A. Allen
Of Attorneys for Amici Curiae Oregon Gay and Lesbian Law Association, et al.