

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 KEIFER;
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,
and

DEFENSE OF MARRIAGE COALITION,
CECIL MICHAEL THOMAS, NANCY JO
THOMAS, DAN MATES, and DICK JORDAN
OSBORNE,

Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit Court
No. 0403-03057

Appellate Court No. A124877

Supreme Court No. S51612

Continued.....

BRIEF *AMICI CURIAE* OF DOCTORS RICHARD S. COLMAN, RODICA N. MEYER, AND LORAH SEBASTIAN IN SUPPORT OF PLAINTIFFS-RESPONDENTS, CROSS-APPELLANTS MARY LI AND REBECCA KENNEDY, ET AL.

Certified Appeal from the Judgment
of the Circuit Court for Multnomah County
Honorable FRANK L. BEARDEN, Judge

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INTEREST OF *AMICI CURIAE*

Amici curiae each have unique and extensive professional and clinical expertise with regard to issues relating to sexual orientation. Richard S. Colman, Ph.D., is a psychologist in private practice in Portland. Dr. Colman treats adolescents who have issues relating to their sexual orientation and works with families headed by gay and lesbian parents. In addition to his private practice, he consults on psychiatric treatment for individual patients, with schools, and with Legacy Emanuel Hospital regarding normative sexual development and sexual identity issues. He also serves as a mental health consultant for school and treatment programs.

Rodica Meyer, MD, is a psychiatrist who currently works with children and their families as the Medical Director of Child & Family Services at the Gateway clinic of Cascadia Behavioral Health Care (formerly, Mount Hood Mental Health). She also works in private practice with gay, lesbian, and bisexual adolescents and with same-sex partners and families, and their children.

Lorah Sebastian, Ph.D., is a psychologist in private practice in Portland. She has served as a consultant for the Department of Human Services and other public agencies. She is also the past president of the Oregon Psychological Association. Her practice area includes evaluating and working with parents who are gay and lesbian, as well as children who are gay and lesbian. She has made presentations on childhood development to school counselors and mental health professionals, school professionals, attorneys, and parent groups, as well as taught graduate level courses on child development.

Amici oppose laws, like the one at issue in this case, that provide for differential and discriminatory treatment of intimate relationships based solely on the parties' sexual

orientation or gender. There is no support in social science for the disparate treatment these laws impose.

Given the work of *amici*, they have expertise that will assist the court in reaching a proper resolution of the questions presented in this case, particularly the issue of immutability of sexual orientation.

INTRODUCTION

Intervenors-Defendants-Appellants Defense of Marriage Coalition et al. (“DOMC”) suggest that homosexuality is a mutable characteristic. DOMC’s Br. at 45-46 & n.39. Although the state notes that “the class of persons whose sexual orientation leads them to choose to marry a person of the same sex seems more comparable to the classes defined by gender and religion” — traits that the court has characterized as immutable¹ — it nevertheless identifies sexual orientation as a “possibly ‘mutable’ personal characteristic[.]” State’s Brief at 47; *see id.* at 44 (“Nor is it possible, in light of the current lack of scientific agreement, to say with any certainty just how ‘immutable’ one’s sexual orientation may be.”)

Neither DOMC nor the state cites any authority to support its assertions. Social science research demonstrates that the assumptions of DOMC and the state about the purported mutability of sexual orientation are incorrect. That research establishes that homosexuality is a normal form of biopsychosocial development and that a person’s sexual orientation as gay or lesbian is a deeply-ingrained, identity-forming characteristic that is established at a young age and is resistant to change.

¹ *Hewitt v. SAIF*, 294 Or 33, 45, 633 P2d 970 (1982) (gender); *Jensen v. Whitlow*, 334 Or 412, 423, 51 P3d 599 (2002) (religion).

This court should reject any suggestion that homosexuality is mutable and deserving of less protection under the Oregon constitution than traits such as race, gender, and religion, which share comparable characteristics of immutability and importance to deeply-ingrained identity.

I. SOCIAL SCIENCE RESEARCH HAS DEMONSTRATED THAT THE SEXUAL ORIENTATION OF GAY MEN AND LESBIANS IS AN IMMUTABLE CHARACTERISTIC

Social science research demonstrates that the sexual orientation of gay men and lesbians emerges by early adolescence and is resistant to change. These factors establish that homosexual orientation is both immutable and a deeply-ingrained, identity-forming characteristic.

A. The Sexual Orientation Of Gay Men and Lesbians Is Generally Settled By Early Adolescence

According to current studies, a person's sexual orientation as gay or lesbian emerges by the time he or she reaches early adolescence:

Accumulating studies from the United States over the past decade suggest that the development of sexual attraction may commence in middle childhood and achieve individual subjective recognition sometime around the age of 10. As these studies have shown, first same-sex attraction for males and females typically occurs at the mean age of 9.6 for boys and between the ages of 10 and 10.5 for girls.

Gilbert Herdt & Martha McClintock, *The Magical Age of 10*, 29 Archives of Sexual Behavior 587, 597 (2000) (citations omitted); *see also* Ritch C. Savin-Williams & Lisa Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 Archives of Sexual Behavior 607, 609-11 (2000) (reviewing authorities and concluding that same-sex attraction occurs between ages of 9 and 11); Martha McClintock & Gilbert Herdt, *Rethinking Puberty: The Development of Sexual Attraction*, 5 Current Directions in Psychological Science 178 (1996) ("Recent findings

from three distinct and significant studies have pointed to the age of 10 as the mean age of first sexual attraction — well before puberty, which is typically defined as the age when the capacity to procreate is attained.”); Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 *Science* 321, 322 (1993) (reporting study of homosexual males that found most experienced first attraction to other males by age 10). That homosexuality is established at such a young age, before any sexual activity, indicates that it is an immutable characteristic.

The early establishment of homosexual attraction also indicates that homosexuality is a deeply-ingrained and identity-forming characteristic. Indeed, sexual orientation “is a fundamental facet of one’s experience and sense of self.” National Association of Social Workers, *Social Work Speaks: NASW Policy Statements* 226 (6th ed. 2003). One study noted, for example, that “[o]ur findings suggest that homosexuality is as deeply ingrained as heterosexuality, so that the differences in behaviors or social experiences of prehomosexual boys and girls and their preheterosexual counterparts reflect or express, rather than cause, their eventual homosexual preference.” Alan P. Bell, et al., *Sexual Preference: Its Development in Men and Women* 190-91 (1981); see also Martha McClintock & Gilbert Herdt, *Rethinking Puberty: The Development of Sexual Attraction*, 5 *Current Directions in Psychological Science* at 178 (“by the time he entered puberty[,] sexual attraction to the same gender was so familiar to him [internal cite omitted] that it defined his selfhood”).

B. The Sexual Orientation Of Gay Men And Lesbians Is Resistant To Change

Not only is homosexual orientation settled by the time a person reaches early adolescence, it — like heterosexual orientation — is resistant to change. “There is no reason to think it would be any easier for homosexual men or women to reverse their

sexual orientation than it would be for heterosexual[s] . . . to become predominantly or exclusively homosexual.” Alan P. Bell, et al., *Sexual Preference: Its Development in Men and Women* at 222.

No data demonstrate that so-called “reparative” or conversion techniques are effective. “There is little evidence that treatment actually changes sexual attractions, as opposed to reducing or eliminating same-sex sexual behavior.” National Association of Social Workers, *Policy Statement on Lesbian, Gay and Bisexual Issues* (Aug. 1996) (approved by National Association of Social Workers Delegate Assembly), *reprinted in* National Association of Social Workers, *Social Work Speaks: NASW Policy Statements* at 225; *see* Alan P. Bell, et al., *Sexual Preference: Its Development in Men and Women* at 211 (“To therapists, we would suggest that exclusive homosexuality probably is so deeply ingrained that one should not attempt or expect to change it.”) Based on the prevailing knowledge, the National Association of Social Workers has adopted the policy that social workers must explain to their clients the lack of documented successful attempts at changing sexual orientation. National Association of Social Workers, *Policy Statement on Lesbian, Gay and Bisexual Issues* (Aug. 1996) (approved by National Association of Social Workers Delegate Assembly), *reprinted in* National Association of Social Workers, *Social Work Speaks: NASW Policy Statements* at 230.

Because the sexual orientation of gay men and lesbians is developed at an early age, is deeply-ingrained and important to forming their identity, and is resistant to change, this court should reject any suggestion that homosexuality is deserving of less

protection under the Oregon constitution than traits such as race, gender, and religion, which share comparable characteristics of immutability and importance to identity.²

II. HOMOSEXUALITY IS A NORMAL FORM OF BIOPSYCHOSOCIAL DEVELOPMENT

In studies of human beings and animals, scientists and other professionals have found that homosexuality is a normal form of biopsychosocial development. Studies “overwhelmingly suggest that homosexuality per se is not related to psychopathology or psychological adjustment * * *. The few studies that suggest the contrary are typically among the weakest methodologically, and some of these are so flawed as to be uninterpretable.” John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *Homosexuality: Research Implications for Public Policy* 115, 131 (John C. Gonsiorek & James D. Weinrich eds., 1991); see also John A.W. Kirsch & James D. Weinrich, *Homosexuality, Nature and Biology: Is Homosexuality Natural?*

² Although bisexuality is not as well studied as homosexuality, it is generally considered an alternative, and separate, form of sexual orientation. See, e.g., Paula C. Rust, *Coming Out in the Age of Social Constructionism: Sexual Formation among Lesbian and Bisexual Women*, 7 *Gender and Society* 50, 51 (1993); Jay P. Paul, *The Bisexual Identity: An Idea Without Social Recognition*, in *Origins of Sexuality and Homosexuality* 45, 46 (John P. DeCecco & Michael G. Shively eds., 1985). The existence of people with bisexual orientation, who are attracted to members of both sexes, has no bearing on the established consensus that homosexual orientation is established at a young age and is resistant to change, which are hallmarks of an immutable characteristic. See Milton Diamond, *Bisexuality: A Biological Perspective*, in *Bisexualities: The Ideology and Practice of Sexual Contact with Both Men and Women* 53, 65 (Erwin J. Haeberle & Rolf Gindorf eds., 1998); see also Alan Bell, et al., *Sexual Preference: Its Development in Men and Women* at 211.

Similarly, amici recognize that some individuals may move from homosexual practices to heterosexual practices (and vice versa). That the practices of some individuals may change over time does not alter the consensus in the reported studies and literature that an individual’s underlying homosexual orientation is established at a young age and resistant to change. Compare American Psychiatric Association, *Gay, Lesbian and Bisexual Issues* (May 2000), at 1 (“Individuals [may] become aware at different points in their lives that they are heterosexual, gay, lesbian, or bisexual.”), available at http://www.psych.org/public_info/gaylesbianbisexualissues22701.pdf, with *id.* at 5 (“To date, there are no scientifically rigorous outcome studies to determine . . . the actual efficacy . . . of ‘reparative’ treatments.”).

(footnote continued)

Does it Matter?, in *Homosexuality: Research Implications for Public Policy* 13, 18-19 (John C. Gonsiorek & James D. Weinrich eds., 1991) (reporting that homosexual behavior occurs widely in humans and other species).

Indeed, for more than a quarter of a century, the mental health professions have viewed homosexuality as an alternative form of biopsychosocial development and *not* a mental disorder. For example, the National Association of Social Workers believes that homosexuality is a normal form of sexuality. National Association of Social Workers, *Policy Statement on Lesbian and Gay Issues* (Aug. 1993) (approved by National Association of Social Workers Delegate Assembly), *reprinted in* National Association of Social Workers, *Social Work Speaks: NASW Policy Statements* 162 (3d ed. 1994). Similarly, in a resolution voting to remove “homosexuality” from the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, the Association declared in 1973:

Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation, and licensing, and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other persons.

American Psychiatric Association, *Position on Homosexuality and Civil Rights* , 131 American Journal of Psychiatry 497 (1974). The American Psychological Association adopted the same position the following year, urging all mental health professionals to dispel the stigma of mental illness that had been associated with homosexuality. J.J.

(footnote continued from previous page)

Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 *American Psychologist* 620, 633 (1975). Thus, scientific research and the experience of the mental health professions support the position that homosexuality is an alternative characteristic that is as normal as heterosexuality.

CONCLUSION

For the reasons set forth above, this court should reject any suggestion that homosexuality is mutable and deserving of less protection under the Oregon constitution than traits such as race, gender, and religion, which share comparable characteristics of immutability and importance to identity.

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I hereby certify that on the date shown below, I filed the Brief of *Amici Curiae* of Doctors Richard S. Colman, Rodica N. Meyer, and Lorah Sebastian in Support of Plaintiffs-Respondents, Cross-Appellants Mary Li and Rebecca Kennedy, et al., by first-class mail by causing an original and 15 copies thereof to be deposited with the United States Postal Service in Portland, Oregon, contained in a sealed package, postage prepaid, and addressed to the State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, Oregon 97310.

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