1995 WL 782809 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Roy ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO, Petitioners,

v.

Richard G. EVANS, Angela ROMERO, Linda FOWLER, Paul FROWN, Priscilia INKPEN, John MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN, Respondents.

No. 94-1039.
October Term, 1995.
June 19, 1995.

On Writ of Certiorari to The Supreme Court of the State of Colorado

BRIEF OF THE HUMAN RIGHIS CAMPAIGN FUND ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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*1 INTEREST OF AMICI CURIAE

Amici are a variety of organizations from across the country that are deeply concerned about and affected by Colorado's Amendment 2. Amici include several national organizations dedicated to the protection of civil rights, including the Human Rights Campaign Fund, the National Gay and Lesbian Task Force, the National Lesbian and Gay Law Association, the National

Center for Lesbian Rights, the Gay and Lesbian Medical Association, the Union of American Hebrew Congregations, the National Asian Pacific American Legal Consortium, the National Organization for Women and the NOW Legal Defense and Education Fund.

Amici also include state organizations concerned about discrimination, including the Connecticut Women's Education and Legal Fund, Inc., the Gay and Lesbian Law Association of Florida, the Oregon Gay and Lesbian Law Association, Bay Area Lawyers for Individual Freedom, Lawyers for Human Rights - the Lesbian and Gay Bar Association of Los Angeles, Orange County Lawyers for Equality Gay and Lesbian, and the Tom Homann Bar Association of San Diego.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of amici and their statements of interest are set forth in Appendix A.

INTRODUCTION

The people of Colorado have voted to remove from one group of citizens the right to seek anti-discrimination protection through ordinary political means. Petitioners ***2** claim that such an action violates the Equal Protection Clause only if governmental classifications based on the group's characteristic would otherwise warrant "strict scrutiny." Petitioners misconstrue the principles of the Fourteenth Amendment. Amici submit that this Court should affirm the decision below regardless of the level of scrutiny otherwise applied to governmental classifications based on sexual orientation.

If the Court accepts Petitioners' premise, the decision below should still be affirmed because classifications based on sexual orientation warrant strict scrutiny.

SUMMARY OF ARGUMENT

1. The principle of separation of powers requires courts to be deferential to most forms of state action. The Fourteenth Amendment, however, also requires that courts strictly scrutinize certain state actions that may be "inconsistent with elemental constitutional premises." Plyler v. Doe, 457 U.S. 202, 216 (1982).

2. This Court has never specified an absolute checklist of criteria for heightened judicial review. Rather, the Court has applied strict scrutiny when it has concluded that ordinary processes of governmental decision-making with regard to a classification are not working properly. This Court has identified various warning signs that indicate governmental processes are suspect. A number of these warning signs are present in the case of classifications based on sexual orientation and indicate that strict scrutiny is warranted.

4. A key warning sign is that a governmental ***3** classification is based on a characteristic that bears "no relation to the individual's ability to participate in and contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion). An individual's sexual orientation -- be it homosexual, heterosexual, or bisexual -- is irrelevant to that person's ability to perform and contribute to society.

5. A second warning sign is a history of intentional discrimination against the group targeted by the governmental classification. Gay men and lesbians, like women and like racial and ethnic minorities, have experienced extreme and blatant discrimination, followed by a more recent history of sometimes subtle, sometimes overt discrimination.

6. A third warning sign is political powerlessness on the part of the group targeted by the governmental classification. This sign tends to be most relevant when the group is effectively shut out completely from the political process. However, the fact that a group faces ongoing obstacles in the political system, as gay men and lesbians do, reinforces the warning signs noted above.

7. A fourth warning sign is the immutability of the characteristic targeted by the governmental classification. One meaning of immutability revolves around the concept of lack of responsibility in acquiring the characteristic at issue. This meaning of immutability is an appropriate warning sign and sexual orientation is an example of this type of immutable characteristic. The second meaning of immutability pertains to a "passive" characteristic that has no behavioral aspects. This meaning stems from an ex ante analysis of classifications that have warranted strict scrutiny and is not a warning sign for strict scrutiny.

***4** 8. This Court's opinion in Bowers v. Hardwick, 478 U.S. 186 (1986) does not preclude the conclusion that classifications based on sexual orientation warrant strict scrutiny. While there is no substantive due process right to engage in homosexual sodomy, that does not mean that invidious discrimination against gay people is not a violation of the Equal Protection Clause. Moreover, since sodomy does not define the class of homosexuals, there is nothing in the logic of the Hardwick decision that makes strict scrutiny for gay people incongruous.

ARGUMENT

I. THIS COURT NEED NOT DECIDE WHETHER GOVERNMENTAL CLASSIFICATIONS BASED ON SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY BY THE COURTS.

Respondents have presented two arguments to this Court -- first, that Amendment 2 burdens a fundamental right to participate in the political process and fails constitutional muster under a standard of strict scrutiny; and second, that Amendment 2 fails constitutional muster even if scrutinized under a lenient "rational review" standard.

Petitioners argue that this Court may subject Amendment 2 to strict scrutiny only if classifications based on sexual orientation receive the same level of scrutiny as classifications based on race. Pets. Brief at 18-24. Amici disagree and believe Petitioners have misconstrued the principles of the Fourteenth Amendment and relevant precedent. See generally Amicus Brief of the Colorado Bar Association et al.

***5** Even if this Court accepts Petitioners' premise, it should affirm the decision below because classifications based on sexual orientation warrant strict scrutiny by the courts. [1]

II. GOVERNMENTAL CLASSIFICATIONS BASED ON SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY BY THE COURTS.

A. Heightened Judicial Scrutiny Is Mandated When Ordinary Processes Of Governmental Decision-making Are Suspect.

The Equal Protection Clause of the Fourteenth Amendment requires that "all persons similarly circumstanced shall be treated alike." Plyler v. Doe, 457 U.S. 202, 216 (1982). But "the initial discretion to determine what is 'different' and what is the 'same' resides in the legislatures of the States." Id. Legislatures establish classifications in numerous contexts and must have substantial latitude to decide what classifications meet the needs of society. See Parham v. Hughes, 441 U.S. 347, 351 (1979). Respectful of the separation of powers inherent in our system, courts are appropriately deferential to most forms of state action, requiring simply that there be a "rational relationship between the disparity of treatment and some legitimate government purpose." Heller v. Doe, 113 S.Ct. 2637, 2642 (1993).

The Fourteenth Amendment, however, requires that ***6** courts not treat every classification so deferentially. "The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises." Plyler, 457 U.S. at 216. Thus, in limited circumstances, the Fourteenth Amendment requires that courts affirmatively intervene by scrutinizing certain governmental actions more closely. The issue this brief addresses is how courts know when to undertake this more rigorous review of governmental line-drawing.

This Court has not specified a checklist of criteria that must always be met in order to warrant heightened scrutiny. Rather, the Court has identified indicia of suspectness as Fourteenth Amendment jurisprudence has evolved. See Korematsu v. United States, 323 U.S. 214, 216 (1944), ("[i]t should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (because central purpose of the Fourteenth Amendment was to eradicate governmental racial discrimination, such classifications are strictly scrutinized); Graham v. Richardson, 403 U.S. 365, 371-72 (1971)"([a]liens as a class are a "prime example of a 'discrete and insular' minority" for whom heightened scrutiny is appropriate); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality) (history of discrimination against women based on a characteristic that has no relevance to ability demands strict scrutiny of gender-based classifications). [2]

***7** At bottom, this Court has applied strict scrutiny when it has concluded that the ordinary processes of governmental decision-making with regard to a classification are not working properly, such that separation of powers requires judicial intervention. See United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). In Plyler v. Doe, 457 U.S. 202, 216 (1982), and in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985), two cases in which the Court declined to extend heightened scrutiny to a challenged classification, the Court identified various "red flags," or warning signs, that indicate a valid concern with governmental processes is present.

B. The Fact that Sexual Orientation is Unrelated to Ability Presents a Warning Sign to the Courts.

1. A Classification Based on a Characteristic Unrelated to Ability Presents a Warning Sign to the Courts.

One warning sign this Court has identified is that the classification is based on a characteristic that bears "no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985). When a characteristic is irrelevant to an individual's ability to perform or participate in society, a classification based on that characteristic is unlikely to be relevant to the achievement of any legitimate state interest. Rather, laws based on such characteristics "are deemed to reflect ***8** prejudice and antipathy--a view that those in the burdened class are not as worthy or deserving as others." Cleburne, 473 U.S. at 440. Laws based on such characteristics may also, as gender-based classifications often do, "reflect outmoded notions of the relative capabilities" of those who hold such characteristics. Id. at 44 (citing Frontiero). In either case, the courts have reason to be concerned that the classification is not the result of "legislative rationality in pursuit of some legitimate objective," but rather, a reflection of "deep-seated prejudice." Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

Thus, in Cleburne, classifications based on mental retardation were not subject to strict scrutiny. "[I]t is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the every day world." 473 U.S. at 442. Because mental retardation was a characteristic that affected an individual's ability to participate effectively in society, the Court had a basis for presuming that the State had a legitimate interest in passing laws that specifically classified on the basis of mental retardation. Id. at 442-43.

By contrast, it was apparently understood by the courts that characteristics such as race and ethnicity were not relevant to an individual's ability to perform in society. The Court's comment in McLaughlin v. Florida, 379 U.S. 184, 192 (1964), that racial classifications are "in most circumstances irrelevant" to any acceptable legislative purpose reflects this understanding. And the Court explicitly noted that gender "frequently bears no relation to ability to perform or contribute," Frontiero, 411 U.S. at 686, thus justifying for the plurality in that case strict scrutiny for gender-based classifications.

***9 2. Sexual Orientation is Unrelated to Ability.**

An individual's sexual orientation -- be it homosexual, heterosexual, or bisexual -- is irrelevant to that person's ability to perform and contribute to society. The once prevalent view that homosexuality was a form of mental illness has long

been rejected by the medical and scientific communities. See Hooker, The Adjustment of the Male Overt Homosexual, 21 Journal of Protective Techniques 17 (1957); Gonsiorek. The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public Policy 115-136 (Weinrich and Gonsiorek, eds., 1991). The American Psychological Association and the American Psychiatric Association have affirmed for more than two decades that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Resolution of the American Psychiatric Association, Dec. 15, 1973; Resolution of the Council of the Representatives of the American Psychological Association, 30 Am. Psychologist 633 (1975).

The simple truth is that gay people demonstrate the same range of abilities as do heterosexual people: some are intellectually gifted, while some are not; some are strong, while others are weak; some are mentally or physically disabled, but most are not. The constant factor is that a person's sexual orientation is not the determinative element in any of these abilities.

C. The Fact that Gay Men, Lesbians, and Bisexuals Have Suffered a History of Discrimination is a Warning Sign to the Courts.

***10 A. History of Discrimination Presents a Warning Sign to the Courts.**

A second warning sign noted by this Court is a history of intentional discrimination against the targeted group. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); Frontiero, 411 U.S. at 684. A history that provides evidence of antipathy towards a group, or of stereotypical views of a group, provides the courts with another red flag that the ordinary processes of governmental decisionmaking may be suspect with regard to the classification at issue. See Plyler, 457 U.S. at 217 n.14; Cleburne, 473 U.S. at 443; Lyng v. Castillo, 477 U.S. 635, 638 (1986).

For example, this Court's assumption in Cleburne that classifications based on mental retardation were not the result of political decisionmaking gone awry was buttressed by the Court's assessment of recent federal and state actions. The Court noted that "the distinctive legislative response, both national and state, to the plight of those who are mentally retarded, demonstrates ... that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." 473 U.S. at 443.

Similarly, in Murgia, the Court declined to subject a law mandating retirement for state police over the age of 50 to strict scrutiny. The Court noted that the elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." 427 U.S. at 313. And when the Court was faced with the claim that nuclear families, made up of ***11** parents, children, and siblings, should receive heightened scrutiny, the Court gave that claim short shrift -- partly because of the lack of any history of discrimination or antipathy against the group at issue. Lyng, 477 U.S. at 638; Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987).

As a practical matter, the classification must target a characteristic that renders a person vulnerable to discrimination -- either a characteristic that is generally superficially evident and immediately renders the individual vulnerable to discrimination (e.g., gender, race, and some ethnicities), or a characteristic that may be disclosed and subsequently renders the individual vulnerable to discrimination (e.g., alienage, illegitimacy, religion and some ethnicities and races). The Court's sporadic comments describing characteristics of vulnerable groups as "obvious" or "distinguishing," see, e.g., Murgia, 427 U.S. at 313-14; Lyng, 477 U.S. at 638 (quoting Murgia), relate to this practical requirement.

As with other warning signs, a history of discrimination is simply one of the red flags designed to alert the Court to the possibility that the processes of state decisionmaking may be suspect. With regard to some classifications, the history of discrimination may have been obvious to the Court and so did not require explicit discussion. See, e.g., Hirabayashi v. United States, 320 U.S. 81 (1943) (ethnicity); Graham v. Richardson, 403 U.S. 365 (1971) (alienage). In Frontiero, 411 U.S. at 685, by contrast, the Court reviewed at length the "gross, stereotyped distinctions between the sexes" and blatant discrimination against women that existed throughout much of the 19th century. The Court observed that while "the position of women in America has improved

markedly in recent decades ... women still face pervasive, although at ***12** times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." Id. at 685-86 (footnoted deleted). This history of discrimination, coupled with the warning sign that gender frequently bore no relation to ability, were sufficient for the plurality to justify strict scrutiny for gender-based classifications.

2. Gay Men, Lesbians, and Bisexuals Manifest a History of Discrimination.

Like women, and like racial and ethnic minorities, gay men, lesbians and bisexuals have experienced an early history of extreme and blatant discrimination, followed by a more recent history of sometimes subtle, sometimes overt discrimination. [3]

Overt and systematic discrimination against gay men and lesbians began in earnest after changes in our economic and social culture, at the turn of the century, allowed for the development of a "homosexual identity." See Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 200-02 (1988) [hereinafter Law]; J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America, 226-27 (1988) [hereinafter D'Emilio & Freedman]. These changes resulted in the development of gay communities in some urban centers. D'Emilio & Freedman at 288-91. Even this ***13** limited public visibility of gay people, however, resulted in a crackdown on the ability of gay people to congregate. Police raids on gay bars and the arrest of patrons were common; patrons frightened of publicity rarely challenged any charges. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551, 1565 (1993) [hereinafter Cain].

In the 1950s, discrimination against gay men and lesbians by the state intensified, setting a norm for private actors. D'Emilio & Freedman, supra, at 292-95. In 1950, the Senate directed a Senate Investigations Subcommittee "to make an investigation into the employment by the Government of homosexuals and other sex perverts." Cain, supra, at 1565-66 (quoting S. Doc. 241, 81st Cong., 2d Sess. 1 (1950)). The Subcommittee concluded that homosexuals were unfit for employment because they "lack the emotional stability of normal persons" and recommended that all homosexuals be dismissed from government employment. Id. at 1566. In 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all government employees who were "sex perverts." Id. From 1947 through mid-1950, 1700 individuals were denied employment by the federal government because of their alleged homosexuality. Developments in the Law -- Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1556 (1989) (footnote omitted).

The 1950's witnessed the development of organizations that were precursors to the modern gay civil rights movement. Id. at 1515-16. The late 1960's witnessed the birth of the modern gay rights movement, with its growth aided by the women's movement. See Law, supra, at 206-12. And in the mid-70s, the psychiatric ***14** profession officially confirmed that homosexuals were not emotionally unstable. R. Bayer, Homosexuality and the Politics of Diagnosis 18-40 (1981).

Discrimination against gay people continued through these years, and up to the present, albeit now in different forms. In the mid-1950s, almost all gay people assumed that survival required they hide their sexual orientation completely-- from friends, family, and coworkers. Thus, discrimination primarily took the form of affirmatively ferreting out, harassing and/or purging gay people from public areas such as bars and government employment. Over the last forty years, more gay people have refused to hide their orientation. Honesty, however, has brought targeted discrimination. In an outstanding example, Lambda Legal Defense and Education Fund, the first gay legal organization, was able to incorporate only by virtue of a court injunction, see In Re Thom, 301 N.E.2d 542 (N.Y. 1973), and other advocacy groups were not as fortunate, see State ex rel. Grant v. Brown, 313 N.E.2d 847 (Ohio 1974), cert. denied sub nom. Duggan v. Brown, 420 U.S. 916 (1975).

Most gay men and lesbians today continue to opt for silence and the hiding of their true identities. A 1992 survey of 1,400 gay men and lesbians in Philadelphia showed that 76% of men and 81% of women conceal their sexual orientation at work. Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Committee on Labor and Human Resources, 103d Cong., 2d Sess. 70 (1994) (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy). Gay people hide their distinguishing characteristic based on fear and experience. A review of twenty surveys conducted across this country between 1980 ***15** and 1991 showed that between 16 and 44 percent of gay men and

lesbians had experienced discrimination in employment. Id. A 1987 Wall Street Journal poll of Fortune 500 executives indicated that 66% of these executives would hesitate to give a management job to a gay person. Id. See also id. at 6 (testimony of Cheryl Summerville) (Summerville's separation notice from Cracker Barrel restaurant read: “This employee is being terminated due to violation of company policy. This employee is gay.”)

Gay men and lesbians, like Jews or members of some ethnic groups, and unlike women or racial minorities, sometimes are able to hide their distinguishing characteristic by disguising or lying about their personal interests, relationships, and activities. But this socially-imposed pressure to “pass” is itself a form of discrimination. Indeed, constantly keeping secret an important part of one's identity can create shame, undermine self-respect, and increase stress levels. See id. at 70 (statement of Carnevale); Law, supra, at 212. This pressure to “pass” is not a far cry from the pressure on Jews in the early-to-mid 1900s to hide their identity so as to increase their employment success in certain occupations.

The history of discrimination against gay men and lesbians, coupled with the fact that sexual orientation bears no relation to ability, are sufficient to justify strict scrutiny of classifications based on sexual orientation. These red flags indicate to the Court that the ordinary processes of governmental decisionmaking are suspect when applied to classifications based on sexual orientation.

D. The Fact that Gay Men, Lesbians, and Bisexuals Face *16 Obstacles in the Political System Reinforces Other Warning Signs.

1. Political Powerlessness Presents a Warning Sign to the Courts.

This Court has rarely concluded, as an affirmative matter, that a classification based on a characteristic that warrants strict scrutiny targets a class which is politically powerless. For example, the Court did not discuss political powerlessness when it applied heightened scrutiny to classifications based on race, ethnicity or illegitimacy. In Frontiero, 411 U.S. 677, the Court discussed the underrepresentation of women in the political arena, but did so as an example of the “pervasive, although at times more subtle, discrimination” against women. Id. at 686. Only in a case concerning alienage did the Court affirmatively note that aliens deserve “heightened judicial solicitude” because “aliens -- pending their eligibility for citizenship, -- have no direct voice in the political processes.” Foley v. Connelie, 435 U.S. 291, 294 (1978).

The Court has, however, noted the fact of political powerlessness among a list of “traditional indicia” of suspectness. In San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), the Court noted that a class “unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts ... [has] none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”

***17** In Cleburne, after concluding that mental retardation is a characteristic that affects the ability of individuals to perform and that legislatures were responding to the concerns of people with mental retardation in a manner “that belies a continuing antipathy or prejudice,” 473 U.S. at 443, the Court also noted that the legislative response negates the claim that people with mental retardation are “politically powerless in the sense that they have no ability to attract the attention of the lawmakers.” Id. at 445.

Almost all groups currently accorded heightened scrutiny by the Court, however, are not so politically powerless that “they have no ability to attract the attention of the lawmakers.” Id. Indeed, today most racial, ethnic, and religious minority groups and women have representatives of their groups in state and national legislatures, work in coalitions, and enjoy the support of political figures. See Caplan, A History of the Leadership Conference on Civil Rights, in Leadership Conference on Civil Rights 45th Anniversary 10 (1995). And legal redress for discrimination against members of these groups is available through state and federal laws. See, e.g., 42 U.S.C. § 2000e.

The most appropriate way to view the factor of political powerlessness, therefore, is to view it simply as another warning sign courts use in their efforts to determine the answer to their underlying question -- is governmental decisionmaking with regard to the classification suspect? This warning sign may be sufficient on its own if a group is effectively closed out of the political process completely. See Foley, 435 U.S. at 294. Other groups who are not shut out of the political process completely may often, nevertheless, have experienced a ***18** history of exclusion from the process -- because they were denied the right to vote, or because representatives of the group were unlikely to be elected, or because it was difficult for them to organize and form coalitions. If coupled with the other warning signs, these factors may reinforce the court's judgment that judicial intervention is appropriate.

2. Gay People and Political Powerlessness

Like women, and like racial and ethnic minorities, gay people manifest a history of significant exclusion from the political system, followed by a continuing period of overcoming obstacles in the system. While gay people have never been denied explicitly the right to vote, they have historically been effectively excluded as visible participants in the system. In recent years, although some openly gay people have been elected to local councils, state legislatures, and Congress, such representatives are still markedly fewer in number than representatives from other minority groups, primarily because a candidate's open homosexuality is still a significant disadvantage in the political arena. According to the Gay and Lesbian Victory Fund, only 83 of the 511,039 elected officials (less than .02%) currently serving in the United States are openly gay.

Despite the presence of some openly gay representatives, gay people still face significant obstacles in the political process. Most gay people avoid prejudice by attempting to keep their sexual orientation secret. This poses a particular problem for political organizers who “somehow ... must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may ***19** involve.” B. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 718-42 (1985). See also Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 U.C.L.A. L. Rev. 915, 970-973 (1989) [[hereinafter Halley].

The fact that many gay people hide their orientation also affects the ability of gay groups to form coalitions. As Professor Ely observes, social interaction is critical for destroying the stereotypes that “ameliorate ... cooperation-blocking prejudice.” J. Ely, Democracy and Distrust 161 (1980). While non-gay people interact with gay people all the time, that interaction does not necessarily help diminish stereotypes “since a person's homosexuality is not normally a characteristic of which others become aware simply, say, by working with him or her.” Id. at 162-163. And gay people cannot easily correct those stereotypes by stating their homosexuality and then serving as counterexamples to the stereotypes because, as a result of “the prejudices of many of the rest of us there would be serious social costs involved in such an admission.” Id. at 163. As Professor Ely concludes, “[i]t is therefore a combination of the factors of prejudice and hideability that renders classifications that disadvantage homosexuals suspicious.” Id. at 163-164.

Gay people also find it difficult to form coalitions because groups that would ordinarily join forces with other underprivileged groups sometimes hold back because they face conflict from within their own constituencies on the issue of sexual orientation. See, e.g., Dalton, AIDS in Blackface, Daedalus, Summer 1989, at 205 (discussing homophobia in the African-American community). And some sympathetic, non-gay policymakers may be afraid to take any favorable action on gay rights issues because such ***20** actions might earn the individual a perceived homosexual identity, with all the attendant burdens. See Halley, supra, at 973.

Gay people have slowly begun to achieve a few successes in the political arena, as evidenced through the passage of some local and state anti-discrimination laws. But having done so, gay people now face a new obstacle in the political arena. In response to these limited successes, states such as Colorado and cities such as Cincinnati, have changed the rules of the game so that gay people must first achieve repeal of limitations imposed by a ballot initiative before they can achieve passage of anti-discrimination legislation. Compare Reitman v. Mulkey, 387 U.S. 369 (1967) and Hunter v. Erickson, 393 U.S. 385 (1969) (a

similar “moving of the goal posts” technique used against racial and religious minorities). Indeed, it would be a supreme irony if this Court were now to use the purported political power of gay people as a rationale for upholding an initiative that shuts them out of the political system on the crucial issue of discrimination.

The history of gay people's political powerlessness, and the significant obstacles gay people continue to face in the political arena, serve as an additional warning sign to the courts, reinforcing the judgment drawn from the other warning signs that governmental classifications based on sexual orientation are suspect. [4]

***21 E. The Fact that Sexual Orientation is a Characteristic For Which an Individual is Not Responsible Presents a Warning Sign to the Court.**

Some courts have concluded that classifications based on sexual orientation do not deserve heightened scrutiny, partly because “[m]embers of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature.” Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 103 (1990); see also High Tech Gays, 895 F.2d at 573 (same).

These courts err by transforming a warning sign into a rigid prerequisite. More fundamentally, these courts err by misapprehending the significance of “immutability” in this Court's jurisprudence. These courts have ascribed two meanings to the term “immutability.” The first meaning, which this Court has adopted as a warning sign, revolves around the concept of “lack of responsibility” and relates to the premise that it is unfair to penalize an individual for a characteristic over which the individual has had no responsibility in acquiring. The second meaning, which this Court has never endorsed as a warning sign, revolves around the concept of “passivity,” in the sense of ***22** referring to a “passive” characteristic that has no behavioral aspects.

1. Lack of Responsibility

The fact that a characteristic which identifies a group is one over which group members have had no responsibility in acquiring has been used by the Court as a warning sign that heightened scrutiny is appropriate. For example, in Frontiero, 411 U.S. at 686, the Court noted that sex is “an immutable characteristic determined solely by the accident of birth” and therefore “the imposition of special disabilities because of ... sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility .... ”’ But see Cleburne, 473 U.S. at 442-42 & n.10 (fact of immutability not sufficient where trait correlates with ability.)

The fact that a characteristic is an accident of birth has also served to enhance the Court's scrutiny with regard to two other classifications. In Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972), the Court articulated a “rational basis” standard for classifications based on illegitimacy, but invalidated the challenged statute because punishing an infant for a status of birth it could not control was “unjust and illogical.” Id. at 175. Similarly, in Plyler, 457 U.S. 202, a case concerning denial of education to children of undocumented aliens, the Court relied on the fact that the challenged classification “impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status,” id. at 223, as a “countervailing cost” that reduced the rationality of the state action.

Thus, the fact that an individual has had no ***23** responsibility in acquiring a characteristic has been relevant to the Court as a warning sign in some cases. With regard to this concept of immutability, sexual orientation is akin to gender, race, ethnicity and other similar characteristics.

There is no consensus yet in the scientific community as to whether an individual's sexual orientation (be it homosexual, heterosexual or bisexual) is determined by an individual's genetic makeup, hormonal factors, social environment, or a combination of any of the above. See Burr, Homosexuality and Biology, Atlantic Monthly, Mar. 1993, at 47. It is clear, however, that none of these factors is under an individual's control. Moreover, although the exact origins of sexual desire are

unknown, there is consensus that a person's sexual orientation, homosexual or heterosexual, cannot be changed by a simple decision-making process or by medical intervention. See Coleman, Changing Approaches to the Treatment of Homosexuality, in Homosexuality: Social, Psychological and Biological Issues 81-88 (W. Paul et al. eds., 1982). Trial Tr. at 88-91 (testimony of Dr. Gonsiorek). As Judge Norris observed in Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (concurrence), we do not assume heterosexuals can easily "shift the object of their sexual desires to persons of the same sex," as well as "abstain from heterosexual activity." Science and medicine indicate the same is true of homosexuals. Thus, sexual orientation per se is not a characteristic over which an individual has had responsibility in acquiring.

2. Passive Characteristic.

While an individual has no responsibility in acquiring his or her sexual orientation, each individual ***24** must decide how to respond to that innate orientation -- an issue that does not arise so plainly in race or gender. An ex ante analysis of the classifications to which the Court has accorded heightened scrutiny has resulted in the conclusion for some courts that a characteristic must be passive -- i.e., must exhibit no behavioral components -- in order for it to warrant heightened scrutiny.

This conclusion must be wrong. There is nothing in the logic of this Court's equal protection jurisprudence that would find any relevance in the fact that a characteristic carries with it certain behaviors. For example, while classifications based on religion are strictly scrutinized because they implicate a fundamental right, see U.S. Const. amend. I, such classifications would presumably also raise the warning signs discussed above. It would be irrelevant, in that analysis, that the practices of various religions were inextricably intertwined with various behaviors, such as prayer, fasting, saying blessings, eating certain foods etc.

Thus, the argument that classifications based on sexual orientation fail to warrant strict scrutiny because sexual orientation is not a "passive characteristic" must necessarily speak to a different point. The only possible point is that the decision to respond to one's natural sexual orientation (assuming it is a homosexual one) by engaging in the behaviors that are normal to that orientation (i.e., having a physical and emotional involvement with a person of the same gender) is wrong and removes the possibility of heightened scrutiny.

This argument thus becomes a variant on the theme that this Court's opinion in Bowers v. Hardwick, 478 U.S. 186 (1986) compels the conclusion that classifications ***25** based on sexual orientation must receive rational basis review. See infra, Section III. But the only relevant activity in this society that has been criminalized is the act of sodomy. To the extent an individual desires to engage in sodomy as a means of expressing his or her sexual orientation (be it homosexual or heterosexual), that may be prohibited by the state. But governmental classifications based on homosexuality or bisexuality are not classifications based on sodomy. Rather, they are classifications based on an individual's orientation and an individual's decision to respond to that orientation with a set of behaviors -- many of which do not include sodomy. See infra, Section III.

III. BOWERS V. HARDWICK DOES NOT PRECLUDE A FINDING THAT CLASSIFICATIONS DRAWN ON THE BASIS OF SEXUAL ORIENTATION REQUIRE STRICT SCRUTINY.

The reason most often used by courts to conclude that governmental classifications based on sexual orientation do not warrant heightened scrutiny is this Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986). The Courts of Appeals in the District of Columbia, see Padula v. Webster, 822 F.2d 97, 102-03 (D.C.Cir. 1987), the Seventh Circuit, see Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 1994 U.S. 1004 (1990), the Ninth Circuit, see High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990), the Federal Circuit, see Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 103 (1990) and most recently, the Sixth Circuit, Equality Found. of Greater Cincinnati v. City of Cincinnati, No. 94-3855, 1995 U.S. App. LEXIS 10462, at *16 (6th Cir. May 12, 1995), have ***26** all held that this Court's decision in Hardwick compels the conclusion that classifications based on sexual orientation deserve no more than rational basis review. These decisions rest on two faulty premises.

A. The Substantive Due Process Issue Decided in Hardwick Does not Decide the Equal Protection Issue.

In Bowers v. Hardwick, 478 U.S. 186, 192 (1986), the Court decided that homosexual sodomy is not so "deeply rooted in this Nation's history and tradition" that it falls within the zone of personal privacy protected by the due process clause. That conclusion, however, does not automatically answer the question whether classifications based on sexual orientation deserve heightened scrutiny.

The Due Process Clause has been interpreted "largely (though not exclusively) to protect traditional practices against short-run departures." See Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1163 (1988). Thus, "the Due Process Clause often looks backwards: it is highly relevant to the Due Process issue whether an existing or time-honored convention ... is violated by the practice under attack." Id.

The Equal Protection Clause, by contrast, has been "understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply ingrained and longstanding." Id. Thus, the Equal Protection Clause "looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure." Id.

***27** The fact that these two clauses "operate along different tracks," id., explains why the court's decision in Hardwick that homosexual sodomy is not a protected activity under the Due Process Clause says nothing conclusively about whether classifications based on sexual orientation deserve heightened scrutiny. It is "perfectly consistent" to say that homosexual sodomy is not rooted in the traditions of the country, and thus is not a protected activity under the Due Process Clause, but to acknowledge, at the same time, that the history of "invidious discrimination" against gay people warrants heightened scrutiny for classifications based on sexual orientation. Watkins v. U.S. Army, 875 F.2d 699, 719 (9th Cir. 1989) (Norris, J., concurring).

The different purposes of the two clauses also explains why it is immaterial to an equal protection analysis whether a classification burdens a group whose members engage in some conduct that is otherwise prohibited by the state. For example, assume arguendo, that homosexual sodomy is a fundamental activity for homosexuals as a group. But see infra Part B. The fact that the right to engage in such sodomy is not protected under the Due Process Clause does not inevitably mean that governmental discrimination against homosexuals as a group should not be subject to heightened scrutiny.

An analogy to religion may be illuminating. Setting aside the First Amendment, one could imagine the Court concluding that smoking peyote or sacrificing animals are not activities protected by the Due Process Clause and that such activities may be criminalized by the state. Engaging in such activities may, indeed, be fundamental to particular religious groups. The fact that some of the fundamental activities of a particular religious ***28** group may be criminalized, however, does not inevitably mean that state classifications that burden the religious group as a whole would not be subject to strict scrutiny.

B. Sodomy Does Not Define The Class Of Homosexuals.

Apart from that fact that the substantive due process issue decided in Hardwick does not decide the equal protection issue, the decisions of the lower courts suffer from a second, more basic faulty premise. These courts based their reasoning on an equation of homosexuality with acts of homosexual sodomy. For example, in Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987), the court reasoned that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause .... If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious." See also Woodward v. United States; 871 F.2d 1068, 1076 & n.10 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) (same); High-Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (same); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (same); Equality Found. of Greater Cincinnati v. City of Cincinnati, No. 94-3855, 1995 U.S. App. LEXIS 10462, at *16 (6th Cir. May 12, 1995) (same).

While all of these courts assert that the "conduct that defines the class" of homosexuals may be criminalized, none of the courts explain why oral or anal ***29** sex (which is the actual conduct that is criminalized in most states) "defines" the class of homosexuals. Indeed, statistics derived over the years from studies of sexual behavior belie that assertion. These studies indicate that heterosexuals engage in oral sex at a rate of approximately 75-80%, with the highest rates present among well-educated, non-minority heterosexuals.[5] Even assuming, arguendo, that 90% of homosexuals engage in oral or anal sex, it is hard to understand how this small difference can mean that sodomy (oral or anal sex) defines the class of homosexuals, but not the class of heterosexuals.

Logically, what defines the class of homosexuals or heterosexuals is not the act of engaging in oral or anal sex -- since both homosexuals and heterosexuals engage in those acts in large numbers. Rather, what defines the class is the gender of one's partner. See Hunter, Life after Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531, 550-51 (1992). This is the case whether two people engage in sodomy (oral or anal sex), which is criminalized in approximately half of the states regardless of the gender of the partner with whom one performs the act[6], or whether they engage ***30** in genital manipulation, kissing, hugging, caressing or simple love -- activities which are generally not criminalized in any state regardless of the gender of the partner.[7]

Thus, sodomy per se is not what is "fundamental to [the] nature" of homosexuals." See Watkins v. U.S. Army, 847 F.2d 1329, 1357 (1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989). Rather, what is fundamental to the nature of homosexuals, and what makes them different from heterosexuals, is that they desire a sexual and emotional attachment to a person of the same gender, rather than the opposite gender. In light of this fact, the lower courts were unwarranted in concluding that Hardwick logically precludes the possibility that classifications drawn on the basis of sexual orientation deserve heightened scrutiny.

CONCLUSION

If this Court addresses the issue of the level of scrutiny to be accorded governmental classifications based on sexual orientation, it should find that such classifications warrant strict scrutiny.

APPENDIX A

THE HUMAN RIGHTS CAMPAIGN FUND (HRCF), the nation's largest lesbian and gay political organization, works to end discrimination, secure equal rights, and protect the health and safety of all Americans. HRCF lobbies the federal government on gay, lesbian and AIDS issues; educates the general public; participates in election campaigns; organizes volunteers; and provides expertise and training at the state and local level.

THE NATIONAL GAY AND LESBIAN TASK FORCE (NGLTF) is a 35,000 member civil rights organization dedicated to building a movement to promote freedom and full equality for lesbians and gay men. NGLTF organizes to support the enactment of civil rights legislation and conducts conferences, studies and programs directed at eradicating bias, discrimination and violence against lesbians and gay men. NGLTF therefore has a vital interest in the ability of lesbians and gay men to participate fully in the political process, which is impaired by initiatives such as that passed in Colorado.

THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION (NLGLA) was founded in 1988 as a national association of lawyers, judges, and other legal professionals, law students and affiliated lesbian and gay legal organizations. Its mission is to promote justice within the legal profession for lesbians and gay men in all their diversity. NLGLA has been an affiliate of the American Bar Association since August 1992. It has participated as amicus curiae in numerous state and federal court actions involving or implicating the rights of lesbians and gay men.

THE NATIONAL CENTER FOR LESBIAN RIGHTS (NCLR) is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of their sexual orientation. NCLR is particularly well-suited to offer amicus assistance to this Court in this matter as NCLR attorneys have a litigation history which demonstrates a strong commitment to securing the civil rights of lesbians and gay men. NCLF participated as amicus before this Court in Harley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, et. al. NCLR attorneys have litigated numerous cases in appellate and trial courts where the rights of lesbians and gay men are threatened.

GAY AND LESBIAN ADVOCATES & DEFENDERS (GLAD) is a non-profit public interest law firm which represents gay men, lesbians, and persons with HIV disease in impact litigation throughout New England. GLAD has participated as counsel or as amicus curiae in many cases in both the state and federal courts in which the constitutional rights of lesbian and gay individuals was at issue. Thus, GLAD is well qualified to appear as amicus curiae before this Court.

THE GAY AND LESBIAN MEDICAL ASSOCIATION is an organization of more than 1,600 lesbian, gay, bisexual and transgendered physicians, medical students and their supporters from 48 states and 7 Canadian provinces. The organization is dedicated to combatting homophobia within the medical profession and in society at large, as well as promoting research and delivery of the best possible health care for lesbian, gay, bisexual and transgendered patients. GLMA has an interest in ensuring the fundamental right to participate in the political process and in equal protection.

THE UNION OF AMERICAN HEBREW CONGREGATIONS is a religious and educational organization founded in 1873 and dedicated to the principle of Reform Judaism. The UAHC adopted a resolution in 1977 calling for the end of discrimination on the basis of sexual orientation and has been a consistent supporter of the rights of gay men and lesbians for freedom and dignity. The President of the UAHC, Rabbi Alexander Schindler, has publicly noted the obligation of Jews to remember their history in this regard: “We who were marranos in Madrid, who clung to the closet of assimilation and conversion in order to live without molestation ... cannot deny the demand for gay and lesbian viability.”

THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM is a nonprofit nonpartisan organization whose mission is to advance and to protect the legal and civil rights of Asian Pacific Americans through litigation, education, policy development and advocacy. The Consortium is affiliated with the Asian American Legal Defense and Education Fund in New York, the Asian Law Caucus in San Francisco and the Asian Pacific American Legal Center of Southern California. The Consortium joins this brief because it opposes discrimination based on sexual orientation, as well as race, gender, ethnicity, national origin, disability and age.

THE NATIONAL ORGANIZATION FOR WOMEN (NOW) is the largest feminist organization in the United States, with a membership of over 250,000 women and men in more than 650 chapters in all 50 states and the District of Columbia. Since 1968, a major goal of NOW has been to ensure fair and equal treatment for, and an end to discrimination against lesbians and gay men. In furtherance of that goal, NOW has participated in numerous legal cases and in drafting related legislation. NOW has a strong interest in ensuring that there is heightened judicial scrutiny in all cases involving discrimination or differential treatment of lesbians and gay men.

THE NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF) is a leading national non-profit civil rights organization that provides a broad range of legal and educational services in support of women's efforts to eliminate gender-based discrimination. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. NOW LDEF opposes Issue 3 because it jeopardizes the ability of any group that suffers discrimination to obtain civil rights protection.

THE CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC. (CWEALF) is a non-profit women's rights organization incorporated in 1973. CWEALF's mission is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. CWEALF joins this brief as amicus curiae because we are committed to protecting all women's rights, including the rights of lesbians.

THE GAY AND LESBIAN LAW ASSOCIATION OF FLORIDA (GALLA), a voluntary bar association of the Florida Bar, was organized to promote and protect the rights of hundreds of gay and lesbian lawyers in South Florida. The movant is familiar with the customs, practices, sociological and psychological studies, regulations, and laws regarding sexual orientation. GALLA has appeared as a respondent commenting party before the Florida Supreme Court in In re: Advisory Opinion to the Attorney General -- Restricting Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994) and in The Florida Bar Re: Amendment to Rules Regulating the Florida Bar, 624 So. 2d 720 (Fla. 1993), and before the same court as an amicus in Cox v. Health and Rehabilitative Services, 1995 WL 242399 (Fla. 1995).

BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (BALIF) is a minority bar association founded in 1980, with a membership of more than 500 lesbians, gay men and bisexuals in the legal community. The purposes of BALIF are: 1) to provide a forum for the exchange of ideas and information of concern to lesbians, gay men and bisexuals in the legal community; 2) to discuss and take action on questions of law and the administration of justice as they affect the lesbian, gay and bisexual community; 3) to encourage and support the appointment of lesbian, gay and bisexual attorneys to the judiciary, public agencies and commissions throughout the Bay Area; and 4) to promote the building of coalitions with other legal organizations to combat all forms of discrimination.

LAWYERS FOR HUMAN RIGHTS - THE LESBIAN AND GAY BAR ASSOCIATION OF LOS ANGELES (LHR) is a mutual support network for lesbian, gay and bisexual lawyers, law students and legal workers in the Los Angeles area. Its mission is, in exercising its strength as a bar association, to provide a strong leadership presence of and for lesbian, gay and bisexual persons in the legal profession and in the community at large through social functions, education, legal advocacy and participation in political and civic activities. As a minority bar association, it is committed to the advancement of civil rights and does so through a variety of means, including the submission of amicus briefs in cases important to the lesbian, gay and bisexual community.

ORANGE COUNTY LAWYERS FOR EQUALITY GAY AND LESBIAN (OC-LEGAL) provides a forum and network for lawyers, judges, legal assistants, law students, law professors and others in law-related fields to help end discrimination and to secure the human and civil rights -- guaranteed to all citizens by the U.S. Constitution -- of lesbian and gay people; to educate lesbian and gay people about their rights; and to educate the community at large about the legal rights of gay men and lesbians.

THE OREGON GAY AND LESBIAN LAW ASSOCIATION (OGALLA) is a group of lesbian, gay and bisexual lawyers, judges, legal workers, law students and others who support the purposes of the organization. OGALLA's primary purposes are to promote the fair and just treatment of all people under law regardless of sexual orientation and to educate the public, the legal profession, and the lesbian, gay and bisexual community about legal issues facing the community.

THE TOM HOMANN BAR ASSOCIATION OF SAN DIEGO (THLA) is San Diego's lesbian/gay/bisexual law association. THLA was founded in 1991 by local attorneys and now has more than 140 members. It welcomes lawyers, judges, legal assistants, law students, law professors and other individuals in law-related fields (regardless of sexual orientation). THLA seeks to provide a forum and network for individuals in law-related fields who are interested in helping to secure the human and civil rights of lesbian, gay and bisexual people.

Footnotes

1 Respondents have not “strategically waived” the claim that governmental classifications based on sexual orientation should be accorded heightened scrutiny. That claim was simply irrelevant to the argument presented by Respondents to this Court.

2 Whether gender-based classifications are “inherently suspect” is an open question for this Court. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 & n.9 (1982); Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 373 (1993) (Ginsburg, J., concurring); J.E.B. v. Alabama, 114 S.Ct. 1419, 1426 n.6 (1994). Amici believe gender-based classification should be subject to strict scrutiny.

3 Every court that has addressed this issue has concluded that gay men and lesbians have been subject to a history of discrimination. See High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Padula v. Webster, 822 F.2d 97, 104 (D.C. Cir. 1987).

4 A few courts have concluded that classifications based on sexual orientation do not warrant strict scrutiny because gay people are "not without growing political power," see Ben-Shalom, 881 F.2d at 466; High Tech Gays, 895 F.2d at 574 n.10; Evans v. Romer, No. 92-CV7223, 1993 WL 518586, *12 (Colo. Dist. Ct. Dec. 14, 1993). These courts miss the point entirely. The list of "traditional indicia" of suspectness noted in cases such as Rodriguez and Murgia, are not designed as a mechanical checklist. Rather, they are guideposts for the courts that must make the difficult and nuanced judgment of whether the processes of governmental decisionmaking are suspect with regard to a classification. That judgment is appropriately made by analyzing and weighing all the warning signs -- not by simply observing the presence of a few openly gay representatives, see Ben-Shalom, 881 F.2d at 466, the passage of some anti-discrimination laws, see High-Tech Gays, 895 F.2d at 574, or the fact of a successful coalition effort by a gay group, see Evans, at *12.

5 See R. Michael, J. Gagnon, E. Laumann, G. Kolata, Sex in America 140-41 (1994). Previous studies have reported even higher rates of oral sex. See, e.g., P. Blumstein & P. Schwartz, American Couples: Money, Work, Sex 236, 242 (1983) (reporting that more than 90% of heterosexual men and women engage in oral or anal sex); S. Hite, The Hite Report on Male Sexuality 1121 (1981) (approximately 96% of men surveyed had performed oral sex on a female partner); and C. Tavris & S. Sass, The Redbook Report on Female Sexuality 163 (1977) (85% of women surveyed had performed oral sex on their male partners; 20% had engaged in anal sex.)

6 Twenty-three states still have sodomy laws on the books. Seventeen of those states apply regardless of the gender of the person with whom sodomy is performed. Six states have laws which prohibit sodomy only between persons of the same gender. See Sherman, Love Speech, Stan. L. Rev. 661, 698 (1995) (compiling 22 sodomy statutes, not including that of Texas).

7 One state, Montana, explicitly criminalizes genital manipulation. MONT. CODE. ANN. § 45-5-505 (1994).

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