For Opinion See 123 S.Ct. 2472 , 123 S.Ct. 1512 , 123 S.Ct. 1504 , 123 S.Ct. 1382 , 123 S.Ct. 953 , 123 S.Ct. 661

U.S.Amicus.Brief,2003.

John Geddes LAWRENCE and Tyron GARNER, Petitioners,
v.
STATE OF TEXAS, Respondent.
No. 02-102.
January 16, 2003.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

Brief of the National Lesbian and Gay Law Association, The Asian American Legal Defense and Education Fund, Action Wisconsin, The Bay Area Lawyers for Individual Freedom, The Bay Area Transgender Lawyers' Association, Gay and Lesbian Lawyers of Philadelphia, Gay and Lesbian Lawyers Association of South Florida, Gaylaw, The Lesbian and Gay Law Association of Greater New York, The Lesbian and Gay Lawyers Association of Los Angeles, The Lesbian and Gay Bar Association of Chicago, The Massachusetts Lesbian and Gay Bar Association, The Minnesota Lavender Bar Association, The Northwest Women's Law Center, The Oregon Gay and Lesbian Law Association, The Stonewall Bar Association, The Tom Homann Law Association of San Diego, and The Washington Lesbian and Gay Legal Society as Amici Curiae in Support of Petitioners

J. Paul Oetken
Scott Ruskay-Kidd
Jeanne Locicero
Debevoise & Plimpton
919 Third Avenue
New York, NY 10022
(212) 909-6000
Chai R. Feldblum
Counsel of Record
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 662-9595

Counsel for Amici Curiae

***i** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

Federal Cases

S.W. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 Health Psychology 243 (1996) ... 19

Eli Coleman, *Changing Approaches to the Treatment of Homosexuality, in Homosexuality: Social, Psychological and Biological Issues* (W. Paul et al. eds., 1982) ... 24

David Crary, *Aside From One Setback in Nevada, Gay Causes and Candidates Fare Well in Election*, Associated Press., Nov. 6, 2002 ... 25

John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (1988) ... 17

***ix** *Developments in the Law-Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989) ... 17, 18

William N. Eskridge, Jr., *Gaylaw* (1999) ... 27

William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (1997) ... 16

Marc A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 Stan. L. & Pol'y Rev. 37 (2001) ... 19

Family Research Council, *Talking Points: How Homosexual 'Civil Unions' Harm Marriage* ... 18

FBI Uniform Crime Reports *Hate Crime Statistics* 1995, 2001 ... 22

Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237 (1996) ... 6, 11, 19

David Firestone, *Murder Reveals Double Life of Being Gay in Rural South*, N.Y. Times, March 6, 1999, at A1 ... 20

David Firestone, *Trial in Gay Killing Opens, To New Details of Savagery*, N.Y. Times, Aug. 4, 1999, at A8 ... 21

***x** John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public Policy* 115 (James T. Weinrich & John C. Gonsiorek eds., 1991) ... 15

Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221 (1994) ... 24

Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915 (1989) ... 26

Gregory M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-Group Contact, and Heterosexuals' Attitudes Toward Lesbian and Gay Men, in Out in Force: Sexual Orientation and the Military* (Gregory M. Herek et al. eds., 1996) ... 19

Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay and Bisexual Adults*, 67 J. Consulting & Clinical Psychol. 945 (1999) ... 23, 24

Gregory M. Herek & John P. Capitanio, *"Some of My Best Friends": Intergroup Contact, Concealeable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 Personality & Soc. Psychol. Bull. 412, 419 (1996) ... 16, 18

***xi** Mark Holmberg, *Beheading Stuns Gay Community*, Richmond Times Dispatch, Mar. 7, 1999, at B1 ... 21

Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Projective Techs. 17 (1957) ... 15

Nan D. Hunter, *Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531 (1992) ... 29, 30

Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & Pol'y 397 (2001) ... 10

Randall Kennedy, *Racial Passing*, 62 Ohio St. L.J. 1145 (2001) ... 19

***1** INTEREST OF AMICI CURIAE

Amici curiae are a variety of organizations across the country that work to advance equality rights and are concerned about the impact of the Texas Homosexual Conduct Law. Amici include two national organizations, the National Lesbian and Gay Law Association and the Asian American Legal Defense and Education Fund, and several state and local organizations: Action Wisconsin, the Bay Area Lawyers for Individual Freedom, the Bay Area Transgender Lawyers' Association, Gay and Lesbian Lawyers of Philadelphia, Gay and Lesbian Lawyers Assocation of South Florida, GAYLAW, the Lesbian and Gay Law Association of Greater New York, the Lesbian and Gay Lawyers Association of Los Angeles, the Lesbian and Gay Bar Association of Chicago, the Massachusetts Lesbian and Gay Bar Association, the Minnesota Lavender Bar Association, the Northwest Women's Law Center, the Oregon Gay and Lesbian Law Association, the Stonewall Bar Association, the Tom Homann Law Association of San Diego, and the Washington Lesbian and Gay Legal Society.[FN1]

FN1. A complete list of amici and their statements of interest are set forth in Appendix A. Counsel for amici were the sole authors of this brief. No other person or entity made a monetary contribution to the prepa-

ration or submission of this brief. Amici have obtained the consent of the parties to file this brief. Letters of consent are on file with the Clerk of the Court.

INTRODUCTION

Petitioners John Geddes Lawrence and Tyron Garner were arrested, jailed, and convicted for consensual intimate conduct in the privacy of the home. The law under which they were convicted, Texas Penal Code § 21.06, entitled "Homosexual Conduct," criminalizes sexual acts of same-***2** sex couples while allowing heterosexual couples to engage in the same acts.

The Texas Homosexual Conduct Law violates principles that are basic to the Equal Protection Clause of the Fourteenth Amendment. As this Court reiterated in *Romer v. Evans*, 517 U.S. 620, 632 (1996), animosity toward a group of people is not a legitimate purpose for governmental discrimination against such a group. The State of Texas acknowledges, however, that its discriminatory sexual conduct law is justified solely by the fact that the "electorate evidently continues to believe" that such a discriminatory law correctly reflects the majority's moral views. Cert. Opp. 18. As Petitioners' Brief makes clear, the Texas law fails muster even under the least stringent level of judicial scrutiny-that of rational basis review. In the words of the dissenters below, "[t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict." Pet. App. 44a.[FN2]

FN2. It is well established that government may not act solely to enshrine into law the negative attitudes or distaste of a majority of the population for a distinct sub-group of the public, whether the object of the distaste is interracial couples, mentally retarded individuals, or hippies, and whether the motivation for such distaste is religious, moral, or aesthetic. *See* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes … unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest").

***3** Nevertheless, should this Court choose to rule on the question whether classifications based on sexual orientation must satisfy a higher standard than rational basis review-an action that was unnecessary in *Romer*-this Court should rule that such classifications warrant heightened scrutiny.[FN3] That issue is the subject of this brief.

FN3. The level of scrutiny that this Court applies is important because it affects issues beyond this case. For example, while the Court in *Romer* did not *hold* that classifications based on sexual orientation deserve only rational basis review, some courts have misread the Court's opinion in *Romer* to stand for that proposition. *See. e.g.*, *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002); *Zavatsky v. Anderson*, 130 F. Supp. 2d 349, 356 (D. Conn. 2001). Moreover, given the Court's recent jurisprudence regarding the scope of Congressional power to authorize suits for money damages against the states pursuant to Section 5 of the Fourteenth Amendment, *see, e.g.*, *Bd. of Trustees of the Univ. of Ala, v. Garrett*, 531 U.S. 356 (2001), the standard of review ultimately established by a court for classifications based on sexual orientation will carry relevance for Congressional action as well.

Because the concept of heightened judicial scrutiny has developed to protect basic principles of equal protection, however, the considerations addressed in this brief should inform this Court's equal protection analysis under any level of judicial scrutiny.

SUMMARY OF ARGUMENT

Courts generally accord wide deference to legislative actions, upholding them as long as they are rationally related to a legitimate governmental interest. In limited circumstances, however, this Court has instructed that heightened judicial scrutiny is demanded by principles of equal protection and by the need to ensure that the political process does not target groups out of bias or antipathy.

Under this Court's decisions, legislative actions that classify persons on the basis of a characteristic warrant heightened scrutiny if they meet two essential criteria: (1) the characteristic is unrelated to ability, and (2) the group disfavored by the classification has experienced a history of intentional discrimination. Two other considerations-the immutability of a trait and the political powerlessness of the group holding that trait-are not essential, but, to the extent they are present, they may enhance the need for heightened scrutiny by highlighting the invidiousness of a classification.

Because sexual orientation satisfies these criteria, governmental actions that classify on the basis of sexual orientation should be subjected to heightened scrutiny. First, sexual orientation is a trait that is unrelated to a person's abilities. Second, gay people have experienced a history of intentional, vehement discrimination that continues to the present. Furthermore, sexual orientation is "immutable" in the relevant sense-that it is not chosen and not readily changed-and gay people face discrimination and other obstacles in the political process that have limited their political power relative to other groups.

ARGUMENT

I. COURTS APPLY HEIGHTENED SCRUTINY TO GOVERNMENTAL ACTIONS THAT ARE INHERENTLY 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) (internal quotation marks omitted). However, it is a "practical necessity that most legislation ***5** classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer*, 517 U.S. at 631. Given the reality of legislative activity, and the federalism and separation of powers principles that preclude courts from intruding upon a legislature's role, this Court has developed an equal protection jurisprudence under which a legislature's classifications are generally upheld so long as there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985).

It is basic to principles of equal protection, however, that "the Constitution 'neither knows nor tolerates classes among citizens.' " *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). In order to ensure the protection of these principles in the face of legislative action by majorities, this Court developed the concept of a "more searching judicial inquiry" in situations where there is reason to suspect "prejudice against discrete and insular minorities … which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Thus, in limited circumstances-where discrimination against a group has been persistent, harmful, and unjustified, and government action is unusually likely to disfavor the group without basis-this Court has concluded that the Equal Protection Clause demands that governmental action be subjected to "heightened" or "skeptical scrutiny." *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996).[FN4] As its ***6** equal protection jurisprudence has evolved, this Court has applied heightened scrutiny in some form to legislative discrimination on the basis of a variety of characteristics, including national origin, race, alienage, gender, and illegitimacy. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national origin); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (race); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (gender); *Trimble v. Gordon*, 430 U.S. 762, 767 & n.12 (1977) (illegitimacy); *Virginia*, 518 U.S. at 531 (gender).

FN4. This brief uses the phrase "heightened scrutiny" to refer to a level of judicial scrutiny that is more searching than rational basis review, rather than to a particular tier of review such as "strict" or "intermediate" scrutiny. *See* Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237, 249-63 (1996) (reviewing development of tiers and criteria for application of heightened scrutiny).

A review of this Court's jurisprudence indicates that there are two key elements that have been required to justify heightened scrutiny by the courts: (1) a lack of a relationship between the characteristic underlying a classification and the abilities of people with the characteristic, and (2) a history of discrimination against the group based on that characteristic.

A. The Lack Of A Relationship Between A Characteristic And Ability Is Essential For Application Of Heightened Scrutiny.

When a characteristic is irrelevant to an individual's ability to perform or participate in society, a law that classifies on the basis of such a characteristic is unlikely to be related to the achievement of any acceptable state interest. Such laws are instead more likely to "reflect 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. ***7** Such laws may also, as gender-based classifications often do, "reflect outmoded notions of the relative capabilities" of those who possess such characteristics. *Id.* at 441. In such circumstances, the lack of a relationship between the characteristic and a person's abilities gives rise to a concern that the governmental classification is not the result of "legislative rationality in pursuit of some legitimate objective," but rather a reflection of "deep-seated prejudice." *Plyler*, 457 U.S. at 216 n.14.

In contrast, when a characteristic affects a person's general ability or capacities (even if the same characteristic may also give rise to unfounded discrimination), heightened scrutiny has not been accorded. For example, in *Cleburne*, the Court declined to subject classifications based on mental retardation to heightened scrutiny primarily because "it is undeniable … 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 provides legitimate reasons to classify in various areas (for example, in special education laws or in vocational rehabilitations laws), the Court was reluctant to subject all laws classifying on the basis of mental retardation to heightened judicial scrutiny. *Id.* at 442-43; *see also Frontiero*, 411 U.S. at 686 ("[W]hat differentiates sex from such non-suspect statuses as intelligence and physical disability … is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

B. A History Of Discrimination Based On A Characteristic Is Essential For Application Of Heightened Scrutiny.

There are many characteristics that are generally unrelated to ability and yet do not merit heightened scrutiny. These could include characteristics ranging from having red hair, to being left-handed, to being a lover of opera. While a ***8** court could invalidate legislative actions based on such classifications if it found that they lack any rational relationship to a legitimate governmental purpose, a court would not subject these classifications to heightened scrutiny. This is because they would not meet the second element that this Court has required to justify applying heightened scrutiny-that there be a history of intentional, invidious discrimination against the group *because of* the characteristic. *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, in *United States v. Virginia*, this Court explained that the Court's "skeptical scrutiny of official action denying fights or opportunities based on sex responds to volumes of history"-in particular to the Nation's " 'long and unfortunate history of sex discrimination.' " 518 U.S. at 531 (quoting *Frontiero*, 411 U.S. at 684). In *Frontiero*, the plurality reviewed at length the "gross, stereotyped distinctions between the sexes" and blatant discrimination against women that existed throughout much of the nineteenth century, observing that while "the position of women in America has improved markedly in recent decades … women still face pervasive, although at times more

subtle, discrimination." 411 U.S. at 685-86 (footnotes omitted).

In contrast, when this Court concluded in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), that classifications based on age do not warrant heightened scrutiny, the Court's primary explanation was that elderly individuals "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." *See also Cleburne*, 473 U.S. at 443. Similarly, when faced with the claim that nuclear families (comprising parents, children, and siblings) should receive heightened scrutiny, this Court gave that claim short shrift, in ***9** part because of the lack of any history of discrimination or antipathy against that group. *Lyng*, 477 U.S. at 638; *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987).

C. Although They Are Neither Necessary Nor Sufficient, Additional Factors May Enhance The Justification For Heightened Scrutiny.

In addition to the two essential factors noted above, this Court's decisions suggest that two other factors may provide additional justifications for applying heightened scrutiny. These two factors are the "immutability" of a characteristic and the political powerlessness of those possessing it. Neither of these factors, however, has been held by this Court to be necessary to justify the application of heightened scrutiny, nor have these factors on their own justified the application of such scrutiny.

1. Immutability

When this Court concluded that classifications based on race and national origin should be accorded strict scrutiny, it did not rest its analysis on the notion that race and national origin are "immutable" characteristics. *See Korematsu*, 323 U.S. at 216; *McLaughlin*, 379 U.S. at 191-92; *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Rather, the Court relied on broad, general statements of principle.[FN5]

FN5. *See, e.g.*, *Korematsu*, 323 U.S. at 216 ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); *McLaughlin*, 379 U.S. at 191-92 ("central purpose of the Fourteenth Amendment was to eliminate racial discrimination … [and t]his strong policy renders racial classifications constitutionally suspect") (internal quotation marks omitted).

***10** The "immutability" argument rose to prominence due to the effort by legal advocates to persuade the Court to accord heightened scrutiny to classifications based on gender. One of the salient arguments historically used to justify discriminatory treatment of women was that "natural" inherent differences existed between the sexes. The "immutability" argument, presented by advocates of gender equality, "flipped the meaning of biology" by arguing that the inherent, immutable nature of sex, and the individual's lack of control over that characteristic, made "using it to justify inferior treatment all the more invidious and unfair."[FN6]

FN6. Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & Pol'y 397, 402-03 (2001); *see also* Donald Braman, *Of Race and Immutability*, 46 UCLA L. Rev. 1375, 1453 (1999).

In *Reed v. Reed*, 404 U.S. 71, 73 (1971), the Court considered the constitutionality of an Idaho law that explicitly provided that "males must be preferred to females" when both were equally entitled to administer an estate. The appellant's brief in *Reed* explicitly argued that race and sex were both immutable characteristics that equally deserved "suspect classification" status.[FN7]

FN7. "Although the legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an *unalterable* identifying trait over which the individual *has no control* and for which he or she should not be disadvantaged by the law." Brief for Sally M. Reed, at 5, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-430) (emphasis added) (discussed in Hunter, *supra*, at 403).

Although the Court did not adopt appellant's argument in *Reed*,[FN8] two years later a plurality of the Court concluded in ***11** *Frontiero*, 411 U.S. at 682, that classifications based on sex, like those based on race, alienage, and national origin, are "inherently suspect" and deserving of "close judicial scrutiny." While the key factor for the Court was the Nation's "long and unfortunate history of sex discrimination," the Court added that "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, 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.'"[FN9]

FN8. The Court, applying rational basis review, invalidated the law as making "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." *Reed*, 404 U.S. at 76.

FN9. *Frontiero*, 411 U.S. at 685, 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). In *Weber*, the Court relied on the fact that illegitimate children were not responsible for their births not as a factor to heighten the standard of review, but rather as an explanation of why the penalty visited upon illegitimate children in the statute at issue was irrational and unjust. 406 U.S. at 175-76. This factor was used in a similar manner in *Plyler*, 457 U.S. at 219-20. *See generally* Feldblum, *supra*, at 253-56.

In *Frontiero*, this Court recognized that other immutable characteristics, such as "intelligence or physical disability," are not accorded suspect status. 411 U.S. at 686. The Court observed that what distinguishes sex from these other statuses is the first key factor noted above: "the sex characteristic frequently bears no relationship to ability to perform or contribute to society." *Id.*

The Court's "immutability" analysis has thus been used to accentuate the unfairness of applying discriminatory laws to groups whose characteristics have little relation to their abilities and who have experienced a history of discrimination based on such characteristics. But the fact that a characteristic is immutable, such as mental retardation, has not been sufficient to justify the application of ***12** heightened scrutiny. *See Cleburne*, 473 U.S. at 440-41, 442 n.10 (casting doubt on immutability theory). Correspondingly, the fact that a status has an "element of voluntariness," that is, a behavioral aspect (such as resident alien status), does not eliminate the basis for heightened scrutiny if the other factors exist. *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).

2. Political Powerlessness

This Court has never held that political powerlessness is essential to the application of heightened scrutiny. The Court did not discuss political powerlessness when it applied heightened scrutiny to classifications based on race, ethnicity, illegitimacy, or gender.[FN10] Only in a case concerning alienage did the Court affirmatively state 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) (internal quotation marks omitted). The Court has also suggested in dicta that "political powerlessness" may be relevant to the question whether heightened scrutiny is appropriate.[FN11]

FN10. In *Virginia*, the Court noted that women were denied the right to vote for over a century, but it did so in describing the Nation's "long and unfortunate history of sex discrimination." 518 U.S. at 531 (internal quotation marks omitted). Similarly, in *Frontiero*, the plurality discussed the underrepresentation of women in the political arena, but it did so as an example of the "pervasive, although at times more subtle, discrimination" against women. 411 U.S. at 686.

FN11. In *San Antonio Independent School District 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." 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.

***13** Most of the groups currently accorded heightened scrutiny by the Court, however, are not "politically powerless" in the sense that "they have no ability to attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. Indeed, today most racial, ethnic, and religious minority groups and women have representatives from their groups in state and national legislatures, work in coalitions, enjoy the support of political figures, and are protected by national, state, and local antidiscrimination laws. *See* Marvin Caplan, *A History of the Leadership Conference on Civil Rights, in Leadership Conference on Civil Rights 45th Anniversary* 10 (1995).

Political powerlessness, therefore, is a relative concept which may enhance the need for close scrutiny of government decision-making. It may strongly support heightened scrutiny if a group is effectively closed out of the political process completely. *See Foley*, 435 U.S. at 294. Other groups that are not completely shut out of the political process, and that can attract the attention and support of some politicians, may nevertheless have experienced a history of exclusion from the political process. Such exclusion and marginalization may have resulted from the fact that such individuals were denied the right to vote, or because representatives of the group were unlikely to be ***14** elected, or because it was difficult for such groups to organize or to form coalitions. If such factors exist, they buttress the need for stricter judicial oversight of legislative action targeting the particular group.

II. GOVERNMENTAL ACTIONS THAT CLASSIFY ON THE BASIS OF SEXUAL ORIENTATION WARRANT HEIGHTENED SCRUTINY.

An application of the conceptual framework established by this Court's equal protection jurisprudence demonstrates that governmental classifications based on sexual orientation deserve heightened scrutiny. Sexual orientation satisfies the two essential elements warranting heightened scrutiny: it is a characteristic unrelated to general ability, and there is a long history of discrimination against gay men, lesbians, and bisexuals based solely on that characteristic. The features of immutability and relative political powerlessness are also present, providing further warning signs that heightened scrutiny is merited.

A. Sexual Orientation Is Unrelated To Ability.

It seems intuitively obvious to most people that an individual's intelligence or physical abilities will affect that individual's ability or capacity to perform certain activities. It is also an accepted proposition, at least at this point in our country's history, that race, gender, and religion do not correlate with an individual's ability or capacity.

Most people would also assume that an individual's *heterosexuality*, like that individual's race or gender, does not correlate with the individual's ability or capacity. Based on all the available scientific evidence, they would be correct. Similarly, an individual's *homosexuality* or *bisexuality* does not correlate with that individual's ability or ***15** capacity to perform a range of societal activities. The once-prevalent view that homosexuality was a form of mental illness has long been rejected by the medical and scientific communities.[FN12]

> FN12. *See* Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Projective Techs. 17 (1957); John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public*

Policy 115, 115-36 (James D. Weinrich & John C. Gonsiorek eds., 1991). The American Psychological Association and the American Psychiatric Association have affirmed for nearly three decades that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." American Psychiatric Association, *Resolution of the American Psychiatric Association* (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974); American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975).

The simple fact is that gay men, lesbians, and bisexuals demonstrate the same range of abilities as do heterosexual people: some are intellectually gifted, while others are not; some are strong, while others are not; some are mentally or physically disabled, but most are not. The constant factor is that the individual's *sexual orientation* is not the determinative element in any of these abilities.[FN13]

FN13. The events of September 11, 2001 provide a powerful example of this simple reality. One of the four individuals believed to have thwarted terrorists' plans to crash United Airlines Flight 93 was gay. *See* Evelyn Nieves, *Passenger on Jet: Gay Hero or Hero Who Was Gay?*, N.Y. Times, Jan. 16, 2002, at A12. The co-pilot of American Airlines Flight 77, which crashed into the Pentagon, was gay. *See* Steve Rothaus, *Couple's Deaths Bring a Special Pain*, Miami Herald, Sept. 20, 2001, at 2E. The 68-year-old New York Fire Department chaplain who attended to the last rites of dying firefighters in the World Trade Center and himself was killed by falling debris was gay. *See* Daniel J. Wakin, *Killed on 9/11, Fire Chaplain Becomes Larger Than Life*, N.Y. Times, Sept. 27, 2002, at A1. The cross-section of these and other gay people who died on September 11 demonstrates their diverse abilities and contributions to society: as nurses, educators, accountants, pilots, flight attendants, small-business owners, employees of the U.S. Army, bond traders, security guards, consultants, computer workers, firefighters, veterans, chaplains, churchgoers, adoptive parents, and partners in long-term, caring relationships. *See* http://www.angelfire.com/f13/uraniamanuscripts/sept11.html (accessed Jan. 12, 2003).

***16** B. Gay Men, Lesbians, And Bisexuals Have Suffered A Persistent History Of Discrimination.

Like women, and like racial and ethnic minorities, gay men and lesbians have experienced a history of purposeful and invidious discrimination.[FN14] This discrimination has been *because of* their particular sexual orientation, *i.e.*, because they are not heterosexual. It has been animated in some cases by religious or moral beliefs,[FN15] but most often by a general discomfort and lack of familiarity with gay people.[FN16] While the nature of discrimination against gay people has changed in recent years, *cf.* *Frontiero*, 411 U.S. at 686, that discrimination remains widespread and significant, and ***17** demands heightened vigilance by the courts. *Cf.* *Virginia*, 518 U.S. at 531-32.

FN14. *See generally* William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 166-89 (1997). 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. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987).

FN15. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting); *Ex parte* *D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998).

FN16. *See* Gregory M. Herek & John P. Capitanio, *"Some of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 Personality & Soc. Psychol. Bull. 412 (1996) (reporting data showing that heterosexuals with gay friends or

family members have significantly more favorable attitudes toward gay people than those without such relationships).

1. Early History of Discrimination

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 prior century led to the development of a "homosexual identity." *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 200-02; John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 226-27 (1988). These changes resulted in the development of gay communities in some urban centers. D'Emilio & Freedman, *supra*, at 288-91. Even this limited public visibility, however, resulted in a crackdown on the ability of gay people to congregate. For example, police raids on gay bars and arrests of patrons were common and continued well into the 1970s; patrons frightened of publicity rarely challenged any charges. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1565 (1993).

In the 1950s, governmental discrimination against gay men and lesbians intensified, setting a norm for private actors. D'Emilio & Freedman, *supra*, at 292-95. In 1950, a Senate Investigations Subcommittee concluded that homosexuals were unfit for federal employment because they "lack the emotional stability of normal persons" and recommended that all homosexuals be dismissed from government employment. Cain, *supra*, at 1566 (quoting S. Doc. No. 241-81, at 1 (1950)). In 1953, President Eisenhower issued Executive Order 10,450, which required the dismissal of all government employees who were "sex perverts," including homosexuals. *Id.* From 1947 through mid-1950, 1,700 individuals were denied employment by the federal government because of their alleged homosexuality. ***18** *Developments in the Law-Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989).

2. Present-Day Discrimination Against Lesbians, Gay Men, and Bisexuals

Society's attitudes toward homosexuality have changed significantly over the past decade. Increasing numbers of gay people-including public figures-are no longer hiding their sexual orientation, thereby diminishing the historical lack of familiarity and social discomfort with gay people.

Nevertheless, homosexuality has been and continues to be associated with a variety of negative and inaccurate stereotypes-that gay people are inherently sick, that they are naturally promiscuous and incapable of having healthy long-term relationships, or that they are child molesters.[FN17] Most generally, many people express a deep visceral antipathy toward gay people.[FN18]

FN17. *See, e.g.*, Peter Sprigg, *A Missing Moral Link? Homosexual Men May Evolve Into Molesters*, Family Research Council, *at* http:// www.frc.org/get/ar02e1.cfm (accessed Jan. 12, 2003); Family Research Council, *Talking Points: How Homosexual 'Civil Unions' Harm Marriage*, *at* http://www.frc.org/get/if00e1.cfm (accessed Jan. 12, 2003).

FN18. *See* Herek & Capitanio, *supra*, at 419 (reporting that in representative nationwide survey, approximately 60% of heterosexual Americans agreed with the statements, "I think lesbians are disgusting," and "I think male homosexuals are disgusting").

Gay men, lesbians, and bisexuals, like members of some ethnic and religious groups with a history of discrimination, are at times able to hide their distinguishing characteristic by disguising their personal interests, relationships, and ***19** activities. And because of the reality of discrimination, many gay people choose to hide their sexual orientation.

But this socially imposed pressure to "pass" is itself a form of discrimination. Constantly keeping secret an important part of one's identity can create shame, increase stress, and undermine physical as well as mental health.[FN19] This pressure to "pass" is akin to the pressure on Jews in the early to mid-1900s to hide their identity to improve their employment prospects,[FN20] or the decision by some African Americans who could "pass" as white to do so in order to avoid discrimination.[FN21] Whether the characteristic

is race, religion, or sexual orientation, societal pressure to hide this identifying characteristic is a form of discrimination. *See* Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 811-36 (2002).

FN19. *See* S.W. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 Health Psychol. 243 (1996); Gregory M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-Group Contact, and Heterosexuals' Attitudes Toward Lesbian and Gay Men*, in *Out in Force: Sexual Orientation and the Military* 211-12 (Gregory M. Herek et al. eds., 1996); Law, *supra*, at 212; Feldblum, *supra*, at 323-27.

FN20. *See* Marc A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 Stan. L. & Pol'y Rev. 37, 46 (2001).

FN21. *See generally* Randall Kennedy, *Racial Passing*, 62 Ohio St. L.J. 1145 (2000).

Because of the continued power of stereotyped views and deeply rooted prejudice, lesbians and gay men remain the victims of extensive discrimination based on their sexual orientation. Departing from heterosexual norms continues to subject an individual to widespread prejudice, ranging from everyday social interactions, to the ability to get and ***20** keep a job,[FN22] obtain housing,[FN23] maintain custody of one's children,[FN24] walk on the street in safety,[FN25] or-as demonstrated here-be free from arrest. Identification as a gay man, lesbian, or bisexual can serve as a "sole and sufficient justification for ostracism" "wherever [one] goes." *Boy Scouts of Am.*, 530 U.S. at 696 (Stevens, J., dissenting).

FN22. *See Texas v. Morales*, 826 S.W.2d 201, 202-03 (Tex. App. 1992) (Texas stipulated that its Homosexual Conduct Law "brands lesbians and gay men as criminals and thereby sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "employment, family issues, and housing"), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994).

FN23. *See id.*

FN24. *See, e.g.*, *D.H. v. H.H.*, No. 1002045, 2002 Ala. LEXIS 44, at *2-*3 (Feb. 15, 2002); *id.* at *12 (Moore, C.J., concurring) (regardless of whether father physically abused child, mother's lesbian relationship "alone is sufficient justification for denying that parent custody of … her own children"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (removing child from custody of mother and granting custody to grandmother because mother was a lesbian).

FN25. *See, e.g.*, David Firestone, *Murder Reveals Double Life of Being Gay in Rural South*, N.Y. Times, Mar. 6, 1999, at A1 (reporting that there were no openly gay people in town, and quoting a gay man: "I would never in a public place grab my partner's hand and walk down the street. It would literally be a death wish.").

Prejudice against gay people continues to take the form of vitriolic hate crimes, often marked by unusual viciousness and brutality, such as the savage murders of Matthew Shepard and others.[FN26]

FN26. *See, e.g.*, James Brooke, *Witnesses Trace Brutal Killing of Gay Student*, N.Y. Times, Nov. 21, 1998, at A9 (describing murder of Matthew Shepard, who was savagely beaten and pistol-whipped while being taunted "It's Gay Awareness Week," and then tied to a fence to die); Francis X. Clines, *For Gay Soldier, A Daily Barrage of Threats and Slurs*, N.Y. Times, Dec. 12, 1999, § 1, at 33 (describing months of anti-gay taunts by man who bludgeoned Barry Winchell to death with a baseball bat while Winchell slept in army barracks); David Firestone, *Trial in Gay Killing Opens, To New Details of Savagery*, N.Y. Times, Aug. 4, 1999, at A8 (describing murder of Billy Jack Gaither, who was beaten, slashed

through the throat, stuffed in the back of a car, killed with an ax, and then lit on fire after flirting with a man); Mark Holmberg, *Beheading Stuns Gay Community*, Richmond Times Dispatch, Mar. 7, 1999, at B1 (describing murder of homosexual Henry Edward Northington, whose decapitated head was carried through the woods and up 70 steps to a footbridge where gay people commonly congregated).

***21** Non-lethal campaigns of harassment are marked by similar viciousness. Gay people frequently encounter shocking displays of hostility and prejudice in fora as diverse as workplaces,[FN27] schools[FN28] and the military.[FN29] And hate ***22** crimes on the basis of sexual orientation continue to increase, rather than decrease.[FN30]

FN27. *See, e.g.*, *Simonton v. Runyon*, 232 F.3d 33, 34-36 (2d Cir. 2000) (describing "all too familiar" "appalling persecution" of gay man by co-workers, including repeated anti-gay slurs, obscenities, references to AIDS, and placement of obscene pictures in his work area); *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347, 351-52 (E.D.N.Y. 1999) (gay police officer was ridiculed as child molester, transvestite, and sadomasochist; fellow officers planted in his car a night stick labeled "dildo," hid his uniform and equipment, and put rocks in the hub caps of his car so that criminals would hear his approach).

FN28. *See, e.g.*, *Nabozny v. Podlesny*, 92 F.3d 446, 451-52 (7th Cir. 1996) (openly gay student was spit and urinated on, subjected to "mock rape," taunted with epithets, and physically assaulted repeatedly for four years; principal responded, "if he was going to be so openly gay, he should expect such behavior from his fellow students" (internal quotation marks omitted)); Evelyn Nieves, *Attacks on a Gay Teenager Prompt Outrage and Soul Searching*, N.Y. Times, Feb. 19, 1999, at A14 (describing student who, after declaring himself gay and founding Gay-Straight Alliance at his high school, was beaten unconscious and awoke with the word "fag" scratched on his stomach and arms).

FN29. *See* Christopher Marquis, *Military Discharges of Gays Rise, and So Do Bias Incidents*, N.Y. Times, Mar. 14, 2002, at A22 ("The number of military discharges of gays has risen to its highest level in 14 years, and reported incidents of anti-gay harassment have climbed by 23 percent in a year"); Elizabeth Becket, *Harassment in the Military is Said to Rise*, N.Y. Times, Mar. 10, 2000, at A14 ("Reports of anti-gay harassment in the military more than doubled last year"); Steven Lee Myers, *Survey of Troops Finds Antigay Bias Common in Service*, N.Y. Times, Mar. 25, 2000, at A1 (Pentagon survey found that 80% of service members reported hearing anti-gay remarks, and 37% reported witnessing or experiencing anti-gay harassment, including verbal remarks, graffiti, vandalism, threats, and physical assaults).

FN30. *Compare* FBI Uniform Crime Reports *Hate Crime Statistics* for 1995, http://www.fbi.gov/ucr/hatecm.htm (accessed Jan. 13, 2003) *with Hate Crime Statistics* for 2001, http://www.fbi.gov/ucr/01hate.pdf (accessed Jan. 13, 2003) (showing 36% increase in hate crimes based on sexual orientation).

The nature and persistence of discrimination against gay men and lesbians distinguish it from other governmental classifications. Indeed, the noteworthy characteristics of anti-gay discrimination-that it is so intense, so multifaceted, and so seemingly natural to so many-are signposts of invidious discrimination, and are shared by other forms of discrimination accorded heightened scrutiny under the Equal Protection Clause.[FN31] Further, discrimination ***23** against gay people is closely tied to gender-based discrimination, which this Court has recognized as invidious.[FN32] The history and nature of discrimination based on sexual orientation thus present a powerful justification for close equal protection scrutiny.

FN31. *See* Boy Scouts of Am., 530 U.S. at 696 (Stevens, J., dissenting); John Smart Mill, The *Subjection of Women, in Three Essays* 427, 439-41 (1975) (power over women, Blacks, and other unjustly dominated groups is marked by feature that it "appear[s] natural to those who possess it"); Samuel A. Marcosson, *Constructive Immutability*, 3 U. Pa. J. Const. L. 646, 714 (2001) (There is "an infinitely broad[], historical national practice of punishing any expression of deviation from the norm of heterosexuality. This pattern operates across the entire spectrum of our national life and profoundly affects every person in America, straight and gay, almost from the moment we are born.… These pressures … are symptomatic of a system of subordination. This is true of sex discrimination … [a]nd it has long been true of the racial caste system as well.").

FN32. *See* J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2361 (1997) ("The social bias against homosexuality is part of the preservation of traditional gender roles and stereotypes, which are both heterosexual and patriarchal.").

C. The Factors Of Immutability And Political Powerlessness Support Heightened Scrutiny For Governmental Classifications Based On Sexual Orientation.

As noted above, this Court has never held that the factors of immutability and political powerlessness are essential to the application of heightened scrutiny. However, these factors support the application of heightened scrutiny to classifications based on sexual orientation.

1. Immutability

There is current consensus in the scientific community that, whether an individual's sexual orientation is caused by genetic makeup, hormonal factors, social environment, or a combination of such factors, none of these factors is generally under an individual's control-and none supports the notion that an individual *chooses* his or her sexual orientation. *See* Chandler Burr, *A Separate Creation* 8-13 (1996); Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay and Bisexual* ***24** *Adults*, 67 J. Consulting & Clinical Psychol. 945 (1999). Akin to race, national origin, gender, and illegitimacy, sexual orientation is a trait for which an individual is not directly responsible.

Moreover, regardless of the causes of sexual orientation, there is consensus that a person's sexual orientation generally cannot be changed by a simple decision-making process or by psychological or medical intervention. *See* Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 224 (1994); Eli Coleman, *Changing Approaches to the Treatment of Homosexuality, in Homosexuality: Social, Psychological and Biological Issues* 81-88 (W. Paul et al. eds., 1982). As Judge Norris observed in *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (concurrence), we do not assume that *heterosexuals* can simply "shift the object of their sexual desires to persons of the same sex." Science indicates that the same is true of persons with a homosexual orientation.

Indeed, there is an extensive history of attempts to "cure" people of homosexuality, including through brutal measures such as shock therapy and mutilation. *See* Yoshino, *supra*, at 784-811. The scientific community has concluded overwhelmingly that such measures are not only futile, but unhealthy and abusive.[FN33] Even if a person's sexual orientation *could* be modified in some circumstances through psychological or behavioral techniques, that would not make ***25** gay people as a class unworthy of legal protection, nor would it render anti-gay discrimination any less objectionable.[FN34] It would be repugnant to suggest that forced change of a person's sexual orientation, even if it were possible, is the only means by which a gay person could avoid disabilities imposed by society.

FN33. Every major mental health organization has adopted a policy statement cautioning the profession and the public about the potential abuses of so-called "conversion" or "reparative" therapies. These policy statements are reproduced on the website of the American Psychological Association at

http://www.apa.org/pi/lgbc/publications/justthefaets.html (accessed Jan. 7, 2003).

FN34. As stated by Judge Norris in *Watkins*: "It is clear that by 'immutability' the court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining the class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed." 875 F.2d at 726 (concurrence).

2. Political Powerlessness

Gay people have historically been excluded as effective participants in the political system and face systematic impairments to political power. Only recently have openly gay people dared to run for public office, and the number of openly gay elected officials in this country remains miniscule. Only 239 (less than .05%) of the 511,039 elected officials currently serving in the United States are openly gay, according to the Gay and Lesbian Victory Fund. There are only three openly gay members of the U.S. Congress.[FN35]

FN35. *See* David Crary, *Aside From One Setback in Nevada, Gay Causes and Candidates Fare Well in Election*, Associated Press., Nov. 6, 2002 (three openly gay members of Congress before and after election). In *Frontiero*, a plurality of this Court observed that "[t]here has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives." 411 U.S. at 686 & n.17. Gay men and lesbians constitute an even smaller fraction of federal officeholders. Moreover, there is only one openly gay judge in the entire federal judiciary. *See* William B. Rubenstein, *Queer Studies II*, 8 UCLA Women's L.J. 379, 401 (1998). Michael R. Sonberg, *2002-The Cradle of Liberty Awaits Us, at* http://home.att.net/~ialgj/ialgjbody.html (accessed Jan. 14, 2003).

***26** The political power of gay people as a group has been and continues to be profoundly affected by the fact that many gay people have historically kept their sexual orientation secret because of persistent discrimination and social stigmatization. Political organizers have faced the problem that they "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 involve." Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 731 (1985).[FN36] Gay people's direct political voice and ability to build coalitions to achieve their legislative goals have thereby been stifled.

FN36. *See also* Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What The Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 93-94, 97 (1991); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 970-973 (1989). In addition, "straights who support gays … risk being cast as gay themselves, and are deterred from expressing pro-gay sympathies." Kenji Yoskino, *Suspect Symbols*, 96 Colum. L. Rev. 1753, 1807-08 (1996).

Gay people have been making political progress in recent years. Based on this limited and recent success, 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," *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989); *see also High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 n.10 (9th Cir. 1990); *accord Romer*, 517 U.S. at 637 (Scalia, J., dissenting). However, neither the existence of some openly gay representatives, *see* ***27***Ben-Shalom*, 881 F.2d at 466, nor the passage of some anti-discrimination laws, *see High-Tech Gays*, 895 F.2d at 574, establishes a degree of political power that undermines the justification for close scrutiny of anti-gay official measures.

As explained above, absolute political powerlessness has never been required by this Court for heightened scrutiny to apply. Indeed, if "growing political power" precluded heightened scrutiny, then race- and

gender-based classifications would not have warranted such scrutiny (or would have outgrown it). In fact, gay people today have relatively little political power in spite of their few electoral achievements. *See* William N. Eskridge, Jr., *Gaylaw* 205 (1999) ("[t]here are today more antigay laws than ever before"); *id.* app. B (collecting laws); *supra* note 35. In mainstream political spheres, gay people- and the issues affecting the gay community-are considered appropriate targets for derision and exclusion.[FN37] In addition, there are many areas of the country where gay people have made very little political progress in the past two decades. In most parts of the country, particularly in non-urban areas, gay people have never been able to elect individuals from their own group and face poor prospects for doing so.

FN37. This is evidenced, for example, by the continuing use and apparent acceptability of anti-gay rhetoric in political discourse. In the last election, a South Carolina Democratic candidate for the U.S. Senate sought to undermine his opponent's endorsement by Rudolph Giuliani by saying, "[Giuliani's] wife kicked him out and he moved in with two gay men and a Shi Tzu. Is that South Carolina values?" Deroy Murdock, *A Few Good Men*, National Review Online, Nov. 18, 2002, *at* http://www.nationalreviewonline.com/murdock/murdock111802.asp. *See also* Philip Shenon, *Gay Philanthropist's Nomination to Become Ambassador to Luxembourg Dies in the Senate*, N.Y. Times, Oct. 20, 1998, at A12 (reporting that the fact that James Hormel was openly gay was deemed a sufficient reason to oppose (and defeat) his confirmation as Ambassador to Luxembourg).

***28** Moreover, the limited political success of gay people as a group has brought with it significant obstacles in the form of focused campaigns to "wage war" against gay people's efforts to establish legal rights and social acceptance.[FN38] The past decade has seen a wave of ballot initiatives, proposed legislation, and lobbying efforts seeking to exclude gay people from the political process and to eliminate anti-discrimination protection, such as Colorado's Amendment 2, which "classifie[d] homosexuals … to make them unequal to everyone else." *Romer*, 517 U.S. at 635.

FN38. Richard Lacayo, *The New Gay Struggle*, Time, Oct. 26, 1998, at 32; *see also supra* note 17.

Like women and racial minorities, gay people contend with significant obstacles to effective political representation arising out of a history of invidious discrimination, providing additional support for heightened judicial scrutiny.

III. THIS COURT'S DECISION IN *BOWERS V. HARDWICK* DOES NOT PRECLUDE THE CONCLUSION THAT CLASSIFICATIONS BASED ON SEXUAL ORIENTATION DESERVE HEIGHTENED SCRUTINY.

A number of courts have concluded that this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), precludes the application of heightened scrutiny to classifications based on sexual orientation. This Court should reject that conclusion because *Bowers* did not decide the equal protection issue, either explicitly, *see id.* at 188 n.2, 196 n.8, or by necessary implication of its due process ruling.[FN39] Moreover, the incorrect premise of every court that ***29** has relied on *Bowers* to apply rational basis review to sexual orientation classifications is that sodomy "defines the class" of gay people.[FN40]

FN39. *See* Cass. R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988); *Watkins*, 875 F.2d at 719 (Norris, J., concurring). Amici also contend that, for the reasons stated in Petitioners' Brief, *Bowers* is flawed as a matter of due process doctrine and should be overruled.

FN40. *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987) ("If the Court was unwilling [in *Bowers*] 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 dis-

crimination against the class is invidious.") (emphasis added); *see also* *Ben-Shalom*, 881 F.2d at 464 (same); *High Tech Gays*, 895 F.2d at 571 (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (same).

"Sodomy" does not define the class of gay people. In fact, the Georgia statute at issue in *Bowers*, like most sodomy laws, defined a class that includes *both* homosexuals who engage in oral or anal sex *and* the significant number of heterosexuals who engage in oral or anal sex.[FN41] A class defined by the act of sodomy would be a class comprising both homosexuals and heterosexuals.[FN42]

FN41. *See* Robert T. Michael et al., *Sex in America* 140-41 (1994) (reporting a finding that heterosexuals engage in oral sex at a rate of approximately 75-80%).

FN42. In contrast, the Texas Homosexual Conduct Law prohibits sodomy *only* when engaged in by same-sex couples. It thus classifies on the basis of sexual orientation for purposes of triggering heightened scrutiny.

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* Nan D. Hunter, ***30***Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 550-51 (1992). In short, 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 of the opposite gender. In light of this reality, the Court's holding in *Bowers* is not an obstacle to the application of heightened scrutiny to classifications based on sexual orientation.

CONCLUSION

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

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

ACTION WISCONSIN, founded in 1994, is a statewide organization dedicated to advancing and protecting the civil rights of lesbian, gay, bisexual, and transgender people. Action Wisconsin carries out this mission through education, advocacy, grassroots organizing, coalition-building, and electoral involvement. These efforts are designed to educate the general voting public, sensitize the media, promote a politically active and effective organizational membership, and better inform policy makers on issues of concern to our members.

THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy, and dissemination of public information. AALDEF has throughout its long history supported equal rights for all people including the rights of gay and lesbian couples.

THE BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (BALIF) is a bar association of over 500 lesbian, gay, bisexual, and transgender members of the San Francisco Bay Area legal community. Since 1980, BALIF has sought to: (1) provide a forum for the exchange of ideas and information of concern to the lesbian, gay, bisexual, and transgender legal community; (2) discuss and take action on questions of law and the administration of justice as they affect the lesbian, gay, bisexual, and transgender community; (3) encourage and support the appointment of lesbian, gay, bisexual, and transgender attorneys to the judiciary, public agencies, and commissions throughout the Bay Area; and (4) promote the building of coalitions with other legal organizations to combat all forms of discrimination. As part of that mission, BALIF actively participates in public policy debates and as amicus curiae in matters affecting the

rights of its members and the lesbian, gay, bisexual, and transgender community at large.

THE BAY AREA TRANSGENDER LAWYERS' ASSOCIATION (BATLAW) is an organized grassroots nonprofit civil rights and educational group seeking to secure and safeguard the rights of all transgendered and Gender Variant persons. BATLAW's Mission is to educate and influence the legislature of the State of California, local governments, and business organizations on the issues and concerns of transgendered people, and to take what action is necessary to safeguard and to secure our rights as American citizens.

THE GAY AND LESBIAN LAWYERS OF PHILADELPHIA (GALLOP) is a bar association serving Southeastern Pennsylvania, New Jersey, and Delaware. Its purposes include promoting the civil and human rights of lesbians and gay men and assuring their fair and just treatment under the law. GALLOP continues a Pennsylvania tradition of advancing equal protection, dating from William Penn, including introduction of the Fourteenth Amendment in Congress by Thaddeus Stevens, a member of the Pennsylvania bar, on April 30, 1866. Stevens said he would “take all I can get in the cause of humanity and leave it to be perfected by better men in better times.”

THE GAY AND LESBIAN LAWYERS ASSOCIATION (GALLA) OF SOUTH FLORIDA is a voluntary, nonprofit organization of the Florida Bar. We are the only such organization in the state of Florida recognized by the Bar. GALLA's purpose is to provide education and outreach on gay and lesbian legal issues to the multitude of communities our members embrace - gay and non-gay, legal and non-legal.

GAYLAW was founded in 1990 as an independent, non-partisan bar association serving lesbian, gay, bisexual, and transgender lawyers, law students, and legal professionals in the National Capital area. GAYLAW works to advance the interests of the lesbian, gay, bisexual, and transgender community, to be their voice within the legal community, and to improve their professional lives. GAYLAW also provides Continuing Legal Education and public education seminars.

THE LESBIAN AND GAY BAR ASSOCIATION OF CHICAGO (LAGBAC) is a bar association of the lesbian, gay, bisexual, and transgender (LGBT) legal community in the Chicago metropolitan area. LAGBAC promotes the advancement of LGBT legal professionals and provides education and outreach on issues important to the LGBT community.

THE LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES (LGLA) is a 25-year-old organization of over 300 lesbian, gay, and bisexual attorneys in the Los Angeles area. It is an affiliate of the Los Angeles County Bar Association, and was a member of the Lobby for Individual Freedom and Equality (LIFE), the statewide lobby that, during its existence, monitored and worked for compassionate and sensible AIDS/HIV legislation and civil rights in Sacramento. LGLA has submitted and sponsored amicus briefs in many cases important to the gay and lesbian community.

THE LESBIAN AND GAY LAW ASSOCIATION OF GREATER NEW YORK (LeGaL) is a bar association of the lesbian, gay, bisexual, and transgender (LGBT) legal community in the New York City metropolitan area. LeGaL promotes the advancement of LGBT legal professionals and fosters participation in pro bono activities in the community.

THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION (MLGBA) was founded in 1985 as a state-wide professional association of lawyers, judges, and law students to promote the administration of justice for all persons without regard to their sexual orientation or gender expression, educate the bar about issues affecting the lives of lesbians, gay men, bisexuals, and transgendered people and advocate for the enactment and enforcement of laws promoting equal rights for all. A key aspect of MLGBA's mission is to ensure that issues pertaining to sexual orientation are handled fairly and respectfully in the courts. MLGBA is affiliated with the Massachusetts Bar Association and the National Lesbian and Gay Law Association.

THE MINNESOTA LAVENDER BAR ASSOCIATION (MLBA) is an organization whose membership includes gay, lesbian, bisexual, and transgendered (GLBT) attorneys, academics, students, and others

involved in the legal profession. Based largely in the Twin Cities area, MLBA seeks to educate the legal profession regarding GLBT legal issues, assure that the legal system responds appropriately to GLBT individuals and concerns, and encourage awareness by GLBT individuals of their legal rights. In 2001, the Minnesota Lavender Bar Association was a named plaintiff in *Doe et al. v. Ventura*, which resulted in a ruling that the Minnesota "sodomy" law violated the privacy guarantees of the state constitution. Consequently, MLBA takes an avid interest in the case at bar.

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, gay, bisexual, and transgender legal organizations. Its mission is to promote justice within the legal profession for lesbians, gays, bisexuals, and transgenders 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, gays, bisexuals, and transgenders.

THE NORTHWEST WOMEN'S LAW CENTER (NWLC) is a non-profit public interest organization that works to advance the legal rights of women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and securing equal rights for lesbians and their families, and has long focused on the threats to equality based solely on sexual orientation. Toward that end, the NWLC has participated as counsel and as amicus curiae in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. The NWLC continues to serve as a regional expert and leading advocate in lesbian and gay issues.

THE OREGON GAY AND LESBIAN LAW ASSOCIATION (OGALLA), a member of the Oregon State Bar Association, is an association of lesbian, gay, bisexual, and transgendered lawyers, judges, legal workers, law students, and those who support the association's purposes. OGALLA was founded in January 1991 to create a statewide organization to support the needs of lesbians, gay men, and other sexual minorities in the legal profession. OGALLA is associated with the National Lesbian and Gay Law Association, an affiliate of the American Bar Association.

THE STONEWALL BAR ASSOCIATION OF GEORGIA (SBA) was founded in 1995 to serve many functions in the gay and the legal communities. The SBA is a professional association of attorneys, judges, law students, and other legal workers who support the rights of lesbian, gay, bisexual, and transgendered people and who oppose discrimination based upon sexual or gender orientation. SBA's membership includes not only lesbian, gay, bisexual, and transgendered persons, but our straight allies as well.

THE TOM HOMANN LAW ASSOCIATION OF SAN DIEGO (THLA) is San Diego's lesbian/gay/bisexual/transgender law association and is a California non-profit corporation. THLA was founded in 1991 by local attorneys and has over 140 members. The membership includes attorneys, judges, legal assistants, paralegals, law students, law professors, and other individuals in law-related fields, regardless of sexual orientation. THLA is committed to securing the basic human rights guaranteed to all citizens by the Constitution and laws of the United States and the State of California, with particular emphasis on securing the human and civil rights of lesbian, gay, bisexual, and transgendered people.

THE WASHINGTON LESBIAN AND GAY LAW SOCIETY (LEGALS) was incorporated in 1997 as an organization of lawyers, law students, law firm employees, judges, and court staff to promote the civil rights of sexual minorities in the State of Washington, provide access to justice and legal services to those in need, educate the legal profession and courts on legal issues relating to sexual orientation and the law, and oppose discrimination based on sexual orientation.

Lawrence v. Garner
2003 WL 152348 (U.S.) (Appellate Brief)

END OF DOCUMENT