COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
SJC No. 08860

HILLARY GOODRIDGE AND JULIE GOODRIDGE ET AL.,

Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH ET. AL.,

Appellees.

BRIEF IN SUPPORT OF APPELLANTS OF *AMICI CURIAE* URBAN LEAGUE OF EASTERN MASSACHUSETTS; WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS; NATIONAL LAWYERS GUILD, MASSACHUSETTS CHAPTER; MASSACHUSETTS NOW; MASSACHUSETTS BLACK WOMEN ATTORNEYS; MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION; GREATER BOSTON CIVIL RIGHTS COALITION; FAIR HOUSING CENTER OF GREATER BOSTON; AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; PEOPLE FOR THE AMERICAN WAY FOUNDATION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC.; NORTHWEST WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, COMMUNITY CHANGE, INC.; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND; JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION; AND NATIONAL COUNCIL OF JEWISH WOMEN**

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STATEMENT OF INTEREST OF *AMICI*

Amici represent a coalition of our nation's leading civil rights groups devoted to seeking equality and protecting the rights of all people, regardless of race, national origin, sex, disability, religion or sexual orientation.[1]

SUMMARY OF ARGUMENT

Amici submit this brief in support of Appellants for two reasons. First, from each of their diverse perspectives, *Amici* all have come to understand that denying lesbians and gay men the fundamental right to marry the partner of their choice is profoundly wrong – just as wrong, and wrong in many of the same ways, as prior denials of marital equality on the basis of race, religion, and sex. *Amici* seek to assist the Court in appreciating the legacy of inequality of our current marriage laws and in understanding the critical role our nation's courts have fulfilled, as part of their constitutional responsibilities, in ending these wrongs.

Second, *Amici* seek to assist the Court with regard to the level of scrutiny that should be applied in this case. *Amici* agree with Appellants that the exclusion of lesbian and gay couples from civil marriage lacks a rational

[1] *See* the Addendum to this brief for individual statements of the interest of each *Amicus*.

relationship to any legitimate government interest. Even were that not true, however, this exclusion would need to withstand strict scrutiny in order to be constitutional, because it discriminates against lesbians and gay men on the basis of their sexual orientation.[2] In determining the level of scrutiny required of laws that discriminate on the basis of sexual orientation, this Court may wish to consider the principles underlying and set forth in federal cases addressing when courts are obligated to examine more closely laws that treat some in our nation unequally to the rest. Proper application of those principles mandates strict scrutiny of the discrimination against lesbians and gay men produced by the application of the Commonwealth's marriage laws to exclude same-sex couples from marriage.

STATEMENT OF ISSUES

Amici adopt Appellants' Statement Of Issues.

STATEMENT OF THE CASE

[2] As demonstrated at length in Appellants' brief, strict scrutiny is required for two additional, independently sufficient reasons. First, Massachusetts' marriage laws, as applied, discriminate on the basis of sex as well as sexual orientation, and statutory classifications based on sex are "subject to strict judicial scrutiny" in Massachusetts. *Lowell v. Kowalksi*, 380 Mass. 663, 666 (1980). Second, courts "treat[] as presumptively invidious those classifications that…impinge upon the exercise of a fundamental right," *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (internal quotations omitted), and, as explained below, the defendants' application of Massachusetts' marriage laws absolutely bars lesbians and gay men from exercising their fundamental right to marry the partner of their choice.

Amici adopt Appellants' Statement Of The Case.

ARGUMENT

I. THE DENIAL OF CIVIL RIGHTS CHALLENGED IN THIS CASE IS AS OFFENSIVE AND DEMANDING OF JUDICIAL REMEDY AS CONSTITUTIONAL FLAWS IN PRIOR MARRIAGE LAWS THAT COURTS RIGHTLY HAVE FOUND IT NECESSARY TO CORRECT IN THE PAST

Our nation's laws governing the institution of civil marriage have been substantially modified over time in response to society's deepened appreciation of the civil rights of all people.[3] When presented with legal challenges, the judiciary has fulfilled its constitutional duty to ensure that the benefits and responsibilities of civil marriage are extended without the kind of unlawful discrimination that is present in this case.

Past challenges to marriage laws have contested (1) limitations placed on members of particular groups in society that abridged their fundamental right to marry, as well as (2) denials of equality to certain people within the institution of marriage. This section of this brief traces these past challenges to illustrate how and when courts are obliged to strike down laws affecting marriage in order to remedy constitutional violations and protect

[3] *See generally* E.J. Graff, *What is Marriage For? The Strange History of Our Most Intimate Institution* (1999).

the civil rights of disfavored minorities.

A. When Equal Access to the Institution of Marriage Wrongly Has Been Denied in the Past, Courts Have Stepped in to Protect that Fundamental Right.

1. Throughout history, members of disfavored groups selectively have been denied the right to marry.

The right to marry has been long understood in this country to be fundamental. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing the right to marry as part of the liberty guaranteed by the due process clause and as "essential to the orderly pursuit of happiness" by those who are free); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing right to marry as "one of the basic civil rights of man"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (referring to "freedom of choice to marry" as a "vital personal right[]" and "fundamental freedom" that may "not be restricted by invidious… discriminations").[4]

Yet, throughout history, this fundamental right selectively has been denied to some individuals on the basis of their class, religion, disability, race or sexual orientation. For example, beginning in the sixteenth century, servants and laborers were not allowed to marry in Bavaria and Austria without the permission of local

[4] *See also* Commonwealth's Opp. To Pls. M. For Summ. Jdgmt. at 29 (conceding that "Supreme Court cases… have recognized a fundamental right to marry.").

governing authorities.[5] Likewise, slaves in the United States were not permitted to marry.[6] The same exclusion from marriage covered indentured servants in some states.[7]

Laws restricting interfaith marriages are another unfortunate part of America's heritage.[8] And statutes prohibiting epileptics from marrying did not disappear in this nation until 1976.[9]

Laws banning marriage between whites and non-whites had a lengthy history in the United States. In 1664, Maryland became the first colony to prohibit interracial marriages.[10] By 1750, all the southern colonies, plus

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[5] Michael Mitterauer and Reinhard Sieder, *The European Family: Patriarchy to Partnership from the Middle Ages to the Present* 123 (1982). This law remained on the books in Austria until 1921. *Id.*

[6] *See, e.g.*, *Frank v. Denham's Adm'r*, 15 Ky. (5 Litt.) 330, 331 (1824); *see generally* Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQUALITY 187 (1987).

[7] *See, e.g.*, *An Act Concerning Servants and Slaves*, ch. XLIX (Oct. 1705), 3 THE STATUTES AT LARGE OF VIRGINIA: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 447-48 (William W. Hening ed.,1809-1823).

[8] *See* Karen M. Woods, *Law Making: A "Wicked and Mischievous Connection": The Origins of Indian-White Miscegenation Law*, 23 LEGAL STUD. FORUM 37, 53 (1999) (referring to 1705 Virginia statute that provided that, if a white master or mistress married a "Jew, Moor, Mahometan, or other infidel," his or her white, Christian servants were to be set free).

[9] *Compare* Roscoe L. Barrow and Howard D. Fabing, *Epilepsy and the Law* 30, 42-56 (2d ed. 1966) (identifying 17 states with such laws as of 1956) with Epilepsy Foundation, *The Legal Rights of Persons with Epilepsy* (1976).

[10] John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 35-36 (1988).

Massachusetts and Pennsylvania, made such marriages illegal.[11] In the nineteenth century, 38 states banned certain interracial marriages and, in the remainder, the same result was accomplished through social prejudice.[12] Little more than half a century ago, anti-miscegenation laws[13] were still on the books in 30 states.[14]

2. Courts have extended the right to marry in the past to those improperly denied that right.

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[11] *Id*. at 36.

[12] Michael Grossberg, *Governing The Hearth* 127 (1985). Although most of these laws principally were directed against marriages between African-Americans and Caucasians, many were more broadly worded and applied. By 1950, 15 states had statutes prohibiting marriages between whites and Asian-Americans. Hrishi Karthikeyan and Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 *ASIAN L.J.* 1, 3, 14-18 (2002). Likewise, Native Americans at one time were prohibited from marrying whites in a number of states, including Massachusetts, Rhode Island, and Maine, *see* Woods, *supra* note 8, 23 LEGAL STUD. FORUM at 58-60, and some states prohibited marriages between Native Americans and blacks. Laurence C. Nolan, *The Meaning of Loving: Marriage, Due Process and Equal Protection (1967- 1990)as Equality and Marriage, From Loving to Zablocki*, 41 HOW. L.J. 245, 249, n. 26 (1998).

[13] "Miscegenation is an awkward term to use [today]; the implication it carries is that 'race' is a meaningful construct and that sex and reproduction between the races is something akin to bestiality. But it is impossible to write about anti-miscegenation laws without using the term." Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & LAW 559, 560 n. 1 (2000).

[14] *Perez v. Sharp*, 198 P.2d 17, 38 (Cal. 1948)(Shenk, J., dissenting).

This is not the first case in which a court has been asked to extend the right to marry to those to whom it was being wrongly denied. As discussed below, courts have done so for members of a number of socially disfavored groups, including prison inmates and "deadbeat dads." The first line of cases in which this occurred, however, dealt with laws barring different-race marriages.

Although some courts had turned aside challenges to these laws on racist grounds,[15] in 1948 the California Supreme Court became the first court to hold that such laws violate the federal Constitution. *Perez v. Sharp*, 198 P.2d 17, 21, 29 (Cal. 1948).

It is instructive to examine *Perez* in some detail because of the parallels between (1) the arguments invoked to justify laws that interfered with a person's choice of whom to marry based on his or her race and (2) the arguments invoked by the defendants in defense of Massachusetts' marriage laws, as applied to lesbians and gay men.

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[15] *See, e.g.*, *Scott v. State*, 39 Ga. 321, 323 (1869) ("The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race. It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.").

The *Perez* decision was controversial and courageous, and yet today it is recognized as clearly correct. At the time the case was decided, there was a nearly "unbroken line of judicial support, both state and federal, for the validity of [anti-miscegenation laws]."[16] Even the United States Supreme Court had approved such laws, affirming a conviction under a statute authorizing up to seven years of hard labor as punishment for entering into an interracial marriage. *Pace v. Alabama*, 106 U.S. 583 (1883).

The *Perez* majority was not deterred, however, by Justice Shenk's citation in his dissent of 19 decisions uniformly upholding anti-miscegenation laws, 198 P.2d at 39-41, nor by his complaints that

> such laws have been in effect in this country since before our national independence and in this state since our first legislative session. They have never been declared unconstitutional by any court in the land although frequently they have been under attack. It is difficult to see why such laws, valid when enacted and constitutionally enforceable in this state for nearly 100 years and elsewhere for a much longer period of time, are now unconstitutional under the same Constitution and with no change in the factual situation.

Id. at 35. The majority understood that the long-standing duration of a wrong cannot justify its perpetuation.[17] Likewise, the majority recognized that the Constitution had

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[16] *Perez* at 41 (Shenk, J., dissenting).

[17] *See id*. at 26-27.

not changed, but rather that its mandates had become more clearly understood.[18]

The *Perez* court also was not dissuaded by the widespread popular support for bans on interracial marriages that existed at the time of the decision.[19] Similarly, it was not put off course by arguments that such marriages were "unnatural," 198 P.2d at 22, or by other myths surrounding interracial relationships.[20] Instead, the court took solemnly its sworn obligation to ensure that, no matter how strongly "tradition" or public sentiment might support such laws, legislation infringing a right as fundamental as the right to marry "must be based upon more than prejudice and must be free from oppressive

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[18] *Id.* at 19-20 (tracing development of equal protection doctrine), 32 (Carter, J., concurring) ("the statutes now before us were never constitutional").

[19] Even nearly twenty years later, in 1967, 72% of Americans were opposed to interracial relationships and 48% thought they should be illegal. Graff, *supra* note 3, at 156. In fact, just two years ago, when the voters of Alabama considered repealing the state's unenforceable ban on interracial marriage, more than 300,000 voters, comprising approximately 40% of that state's voting public, sought to maintain the law on the books. *Alabama Repeals Ban against Interracial Marriage*, CHATTANOOGA TIMES B2 (Nov. 8, 2000). By way of comparison, more Americans are in favor of marriage for lesbian and gay couples today than were in favor of interracial marriage when the Supreme Court struck down anti-miscegenation laws. E.J. Graff, *When Heather's Mommies Marry*, THE BOSTON GLOBE 71 (Jan. 5, 1997).

[20] *See* 198 P.2d at 22, n. 2, *quoting State v. Jackson*, 80 Mo. 175, 179 (1883), which cited "well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman intermarry, they cannot possibly have any progeny."

discrimination to comply with the constitutional requirements of due process and equal protection of the laws." 198 P.2d at 19; *see also id*. at 29 (Carter, J., concurring) (condemning anti-miscegenation laws, however popular, as "the product of ignorance, prejudice and intolerance").

The *Perez* majority also rejected the contentions that "the institution of matrimony is the foundation of society," the integrity of which the nation has a strong interest in maintaining, *id.* at 37; that the state should be able to define who may marry and who may not, *id.* at 37, 39; and that the laws were being applied equally, because members of each racial group were equally precluded from marrying members of the other group. *Id.* at 46.

The *Perez* court was skeptical of the harms allegedly suffered by children born to opposite-race parents, *id.* at 22 and 22 nn. 2-3, and refused to punish children by giving legal force to prejudice about their parents' relationship. *Id.* at 26, 33.

The *Perez* majority also was not deterred by arguments that the state should be allowed to bar certain marriages on the grounds of "moral prohibition," *id.* at 44-45; the adverse social effects they might generate, *id.* at 25, 33; supposedly innate, biological differences, *id.* at 23-25,

44-45; or the state's interest in prohibiting bigamy and incest. *Id.* at 40, 46.[21]

The argument that courts should defer to legislative fact-finding and policy-making in this area, *id.* at 33, 41-43, 46, was also rejected. The *Perez* court understood that, under the Constitution, such deference is neither appropriate nor permissible when fundamental rights or certain forms of discrimination are involved. *Id*. at 21 (noting that legislation of this kind "must be viewed with great suspicion," is presumptively invalid, and is allowed under only the most exceptional circumstances), 33 (concurring that such legislation is "immediately suspect" and must be subjected by courts "to the most rigid scrutiny").

The *Perez* majority rejected this panoply of arguments on the ground that the right to marry is a fundamental right that cannot be restricted on discriminatory or arbitrary grounds that violate "the constitutional requirements of due process and equal protection of the laws," *id.* at 18-19. Justice Traynor's majority opinion reasoned that "the right to marry is the right to join in

[21] The *Perez* court rejected the argument that prohibiting certain marriages would protect public health (because of the alleged higher incidence of particular diseases within certain groups), *id*. at 21, on the grounds that the state (1) prohibited marriages between healthy individuals who did not satisfy the statutory criteria and (2) permitted marriages between unhealthy individuals who did satisfy the statutory criteria. *Id*. at 21.

marriage with the person of one's choice," *id.* at 19; that this is "the essence of the right to marry," *id.* at 21; that "restrict[ing] the scope of [one's] choice [as to whom to marry] restricts [the] right to marry," *id.* at 19; that the right is a "right of individuals, not of … groups," *id.* at 2; and that to bar an individual "by law from marrying the person of his choice," who, to that individual, "may be irreplaceable," improperly is to treat human beings like interchangeable commodities, "bereft of worth and dignity." *Id.* at 30.

Nineteen years after *Perez*, the United States Supreme Court unanimously followed the California high court's result by handing down *Loving v. Virginia*. Like the *Perez* majority, the Supreme Court was not deterred by the lengthy historical roots of anti-miscegenation laws, 388 U.S. at 6, prior case law accepting such laws, *id*. at 7, 10, the continued prevalence of such laws,[22] religious justifications for such laws,[23] or continued popular opposition to interracial marriage.[24] Like the *Perez* majority, the Supreme Court in *Loving* rejected the argument

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[22] *Id*. at 6, n.5 (citing contemporaneous anti-miscegenation statutes of 16 states).

[23] *Id*. at 3 (quoting the following rationale offered by the trial court: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement, there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.").

[24] *See* footnote 19, *supra*.

that the equal application of an invidious statutory regime somehow justified precluding the plaintiff from marrying the person of his choice solely because of a constitutionally irrelevant aspect of his identity. *Id*. at 8-9.

The arguments proffered by the defendants in this case – many of which are indistinguishable from the arguments proffered in defense of anti-miscegenation laws – are no more persuasive or legitimate in this case than they were in their original contexts.

Although *Perez* and *Loving* both dealt with restrictions on the right to marry based on race, the U.S. Supreme Court has emphasized that its "prior and subsequent decisions…confirm that the right to marry is of fundamental importance for all individuals."[25] Applying this principle outside the context of racial discrimination, the high court struck down a statute restricting divorced parents' right to marry if they could not show that they were meeting their child support obligations. *Zablocki*, 434 U.S. at 375, 390-91. Similarly, the Supreme Court struck down a prison regulation that prohibited inmates from marrying unless the prison superintendent approved the marriage. *Turner v. Safley*, 482 U.S. 78, 95-96, 99 (1987).

B. Courts Also Have Intervened To Correct Inequality Of Women Within The Institution Of Marriage.

[25] *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added).

The judiciary has also applied constitutional principles to put an end to denials of women's equality within marriage.[26] Thus, courts have thoroughly repudiated the common law doctrine of "coverture." Under this doctrine, women were treated as their husbands' servants, without any independent legal rights.[27] *See Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment)(reaffirming common law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state," and that a wife could not enter a binding contract without her husband's consent). As a result of contemporary understandings of the fundamental principles of liberty, privacy, and equality, the law no longer allows husbands to exercise such control over their wives. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 897-98 (1992) (striking spousal notice provisions of Pennsylvania abortion statute); *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)(striking down Louisiana community property law

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[26] For a discussion of these issues that focuses in particular upon the development in Massachusetts of gender equality within marriage, *see Amicus* Brief of Historians Nancy F. Cott, Michael Grossberg, et al.

[27] See, e.g., William Blackstone, Commentaries on the Laws of England ch. 15, Book 1, p. 430 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing….").

treating husband as "head and master" of property jointly owned with wife).

Likewise, the courts have disdained as “barbarous” and unenforceable; *State v. Oliver*, 70 N.C. 60, 61 (1874); the related doctrine of “chastisement,” through which the law gave “the husband power to use such degree of force [including horsewhipping] as [was] necessary to make the wife behave herself and know her place.” *Joyner v. Joyner*, 59 N.C. 322, 325 (1862).

Similarly, the so-called “marital exemption” to the crime of rape – which once was present in nearly all states and dated back centuries – has been held unconstitutional by numerous courts as a violation of equal protection. *See, e.g.*, *People v. Liberta*, 474 N.E. 2d 567, 572-73, 575 (N.Y. 1984).

Courts correspondingly have extended to women the right to sue for loss of consortium, previously available only to men. *See, e.g.*, *Moran v. Quality Aluminum Casting Co.*, 150 N.W.2d 137, 139-43 (Wis. 1967).

Based on equality concerns, courts likewise have reinterpreted common law principles to allow married women the right to use their maiden names, *State v. Taylor*, 415 So. 2d 1043, 1048 (Ala. 1982), and have abolished the common law rule “giving a father, as against a mother, a primary right to have his child bear his surname.” *In re*

Marriage of Schiffman, 620 P.2d 579, 583 (Cal. 1980).[28]

C. Allowing Some In Our Society To Be Deprived Of Equal Marriage Rights Denies Human Dignity and Perpetuates Intolerable Harm.

As demonstrated above, courts repeatedly have fulfilled their duty to protect the fundamental right to marry and to enforce, within the institution of marriage, the constitutional guarantee of equal protection of the laws. In so doing, they have demonstrated a deep appreciation for the meaning of marriage. As the United States Supreme Court observed in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965),

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

See also Maynard v. Hill, 125 U.S. 190 (1888) (characterizing marriage as "the most important relation in life"); *Turner v. Safley*, 482 U.S. at 95-96 (noting that

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[28] With equal rights, courts also have mandated equal responsibilities in marriage. *See, e.g., Orr v. Orr*, 440 U.S. 268, 282-83 (1979)(striking down Alabama statutes providing that husbands, but not wives, may be required to pay alimony upon divorce); *Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum*, 417 A.2d 1003, 1005 (N.J. 1980) (overturning common law rule by holding that "both spouses are liable for necessary expenses incurred by either spouse in the course of the marriage.").

marriages "are expressions of emotional support and public commitment" that may have spiritual significance and may be "an exercise of religious faith as well as an expression of personal dedication").

To deny some individuals the right to marry the partner of their choice, based on personal characteristics, is not only to deny them a host of important tangible and intangible benefits and rights,[29] but is to treat them as less than fully human. Those who have been denied the right have readily grasped this. Professor Peggy Cooper Davis has explained that

> former slaves seized the right to marry enthusiastically not only for its private but also for its social meaning…. The formation of legally recognized marriage bonds signified treatment as a human being rather than as chattel – acceptance as people and as members of the political community.[30]

The exclusion of lesbians and gay men from marriage is coming to be understood as having much the same significance. As Professor Nancy Cott has written,

> The exclusion of same-sex partners from free choice in marriage stigmatizes their relationships, and reinforces a caste supremacy

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[29] *See Turner*, *supra*, 482 U.S. at 95-96; Brief of *Amici Curiae* Boston Bar Assocation, et al.

[30] Prof. Peggy Cooper Davis, *Neglected Stories* 35 (1997); *see also* Prof. Nancy Cott, *Public Vows: A History Of Marriage And The Nation* 33 (2000) (denial of right to marry prior to emancipation "quintessentially expressed [slaves'] lack of civil rights").

> of heterosexuality over homosexuality just as laws banning marriage across the color line exhibited and reinforced white supremacy.[31]

Courts have recognized the ways in which denials of the right to marry create one of the most profound, far-reaching, and harmful forms of inequality and have responded by fulfilling their duty to enforce the Constitution's mandates regardless of "tradition" or public opinion.[32] In light of the fundamental importance of the civil rights principles reflected in previous, hard fought battles for legal equality, *Amici* urge this Court to do no less.

II. UNDER FEDERAL PRINCIPLES OF EQUAL PROTECTION, SEXUAL ORIENTATION CLASSIFICATIONS MERIT STRICT SCRUTINY

For the reasons discussed in Appellants' brief, the application of the Commonwealth's marriage laws to deny lesbian and gay couples access to the institution of marriage lacks a rational relationship to any legitimate government interest and therefore violates the right to equal protection even under rational basis review. Accordingly, the level of scrutiny applied in the instant case is not outcome-determinative.[33] Should the Court find otherwise, *Amici* agree with Appellants that, although it is

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[31] *Id.* at 216.

[32] *See Perez*, 198 P.2d at 32-33; *Loving*, 388 U.S. at 11; *Turner*, 482 U.S. at 84.

[33] Because there is no rational basis for the application of the marriage statutes to exclude lesbian and gay couples, it follows *a fortiori* that such application cannot withstand strict scrutiny.

an open question, the Massachusetts Constitution compels the conclusion that classifications based on sexual orientation are subject to strict scrutiny.[34] To the extent the Court seeks the guidance of federal jurisprudence in interpreting the equality guarantees of the Massachusetts Constitution,[35] *Amici* provide here an explication of the principles articulated by the United States Supreme Court for determining when classifications merit strict scrutiny. *Amici* then show that, under those principles, lesbians and gay men constitute a suspect class. Therefore, laws that disadvantage this group – such as the application of Massachusetts' marriage laws – must be subjected to strict scrutiny. This is particularly so because, as discussed below, lesbians and gay men cannot rely on the political processes to obtain protection from discrimination.

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[34] The Commonwealth's argument that the marriage laws do not discriminate on the basis of sexual orientation is patently meritless. The marriage statutes, as applied, result in a complete exclusion of all lesbians and gay men from the right to marry the person of their choice. Although the denial of a marriage license is not explicitly premised on sexual orientation, in functional terms the different-sex requirement is a proxy for heterosexuality.

[35] Although this Court is not, of course, limited to the floor established by federal law when interpreting analogous provisions of the Massachusetts Constitution, it has at times looked to federal case law for guidance. *See, e.g., Wynn & Wynn P.C. v. Mass. Comm'n Against Discrimination*, 431 Mass. 655, 699 n. 29 (2000); *Longval v. Superior Ct. Dep't of Trial Ct.*, 434 Mass. 718, 721-31 (2001); *Scaccia v. State Ethics Comm'n*, 431 Mass. 351, 354-55 (2000).

The level of scrutiny applicable to sexual orientation classifications is an unsettled question under federal law. In the only instance in which the United States Supreme Court granted *certiorari* in a case involving an equal protection challenge to a law that discriminated against lesbians and gay men, *Romer v. Evans*, 517 U.S. 620 (1996), the Court did not address – let alone decide – this issue.[36] In *Romer*, the Supreme Court struck down an amendment to the Colorado Constitution that barred the enactment of anti-discrimination laws and other protections against sexual orientation discrimination, holding that the amendment failed rational basis review. Because the provision was unconstitutional under even the lowest level of scrutiny, the Court did not reach the question of whether heightened scrutiny applies to such classifications. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (courts need not decide level of scrutiny when challenged classification fails under lowest level of review).[37]

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[36] In a dissent from the denial of *certiorari* in a case involving sexual orientation discrimination against a public employee, Justice Brennan, joined by Justice Marshall, concluded that sexual orientation classifications merit at least heightened scrutiny. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of writ of *certiorari*; joined by Marshall, J.).

[37] Few state courts have analyzed this question. In one case that did, *Tanner v. Oregon Health Sciences University*, 971 P.2d 435, 447 (Or. App. 1998), the Oregon Court of Appeals held that sexual orientation classifications trigger strict scrutiny under the Oregon Constitution. *See also Children's Hospital and Medical Center v. Belshe*, 97

Bowers v. Hardwick, 478 U.S. 186 (1986), in which the Supreme Court held that the criminal prosecution of same-sex sexual activity does not violate due process, is sometimes misunderstood to have determined the level of equal protection scrutiny applicable to laws that disadvantage lesbians and gay men. But the Court expressly noted in *Bowers* that it was addressing only the due process question. *Id.* at 190, 196 n. 8. Thus, the level of equal protection scrutiny was not at issue in that case. As Judge Norris explained in *Watkins v. United States Army*,

> The Supreme Court did not decide in [*Bowers*]… whether discrimination against homosexuals violates equal protection. All [*Bowers*] decided is that homosexual sodomy is not…protected by the due process clause. It is perfectly consistent to say that homosexual sodomy is not a practice so deeply rooted in our traditions as to merit due process protection, and at the same time to say, for example, that because homosexuals have historically been subject to invidious discrimination, laws which burden homosexuals as a class should be subjected to heightened scrutiny under the equal protection clause. Indeed, the two propositions may be complementary: In all probability, homosexuality is not considered a deeply-rooted part of our traditions precisely because homosexuals have historically been subjected to invidious discrimination.

Cal. App. 4th 740, 769, 118 Cal. Rptr. 2d 629, 650 (2002) (citing sexual orientation as example of suspect class).

875 F.2d 699, 717-19 (9th Cir. 1989) (Norris, J., concurring in judgment; joined by Canby, J. [internal quotation marks omitted].)[38]

The principles developed in federal equal protection cases make it clear that sexual orientation classifications should receive strict scrutiny. The courts have long taken on the responsibility of protecting the rights of unpopular minorities when the political process is unlikely to correct for majoritarian hostility. In the landmark fourth footnote of *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152

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[38] Some of the federal circuit courts have considered and rejected the application of strict scrutiny to sexual orientation classifications, but all but one of those cases arose in the context of military and security clearance policies. The courts' refusals to apply strict scrutiny in those cases has no bearing on cases outside of that context, since the courts have held that special deference must be given to government judgments regarding military operations and national security. *See, e.g., Able v. U.S.*, 155 F.3d 628, 634 (2d Cir. 1998) ("deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons…that the military has advanced to justify its actions.") (emphasis added); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

Equality Foundation v. Cincinnati, 128 F.3d 289, 294 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998), is the only federal circuit court case to evaluate the applicable level of scrutiny for sexual orientation classifications outside of the military and security clearance context. This decision, rejecting heightened scrutiny, is fatally flawed because it rested on the misunderstanding that the *Romer* Court decided that rational basis review was the appropriate level of scrutiny for laws disadvantaging lesbians and gay men. *Id.* at 294. A number of the military cases were based on the same misunderstanding. *See, e.g., Woodward v. U.S.*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Steffan v. Perry*, 41 F.3d 677, 685 n. 3 (D.C. Cir. 1994).

n.4 (1938), the United States Supreme Court first recognized that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and…may call for a correspondingly more searching judicial inquiry." *Id.* Certain types of classifications, historically tied to "prejudice and antipathy" and "seldom related to the achievement of any legitimate state interest," signal a breakdown in the normal political processes and warrant special judicial vigilance. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). In the nomenclature of the United States Supreme Court, such classifications are suspect and require special scrutiny to ensure that the Equal Protection Clause serves its intended function – "nothing less than the abolition of all caste-based and invidious class-based legislation." *Plyler*, 457 U.S. 202, 213 (1982).

As the United States Supreme Court has summarized:

> [A] suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process."…[These groups have] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).[39]

From these and other United States Supreme Court precedents, three factors supporting strict scrutiny emerge: (1) a history of purposeful unequal treatment on the basis of stereotyped characteristics or antipathy; (2) a lack of relation between the trait defining the group and the ability to perform or contribute to society; and (3) a position of relative political powerlessness within the majoritarian political sphere.[40]

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[39] United States Supreme Court equal protection precedent traditionally has divided government classifications into three categories: suspect, quasi-suspect and non-suspect. *See, e.g., Cleburne*, 473 U.S. at 440. The Court has held that classifications based on race, alienage and national origin are suspect, and thus sustainable only where narrowly tailored to serve a compelling government interest. *Id.* Classifications based upon gender and illegitimacy have been held to be quasi-suspect, and thus subjected to intermediate scrutiny: such classifications have been sustainable only where substantially related to a sufficiently important government interest. *Id.* However, the Court appears to be moving away from this three-tiered framework, and has reviewed classifications formerly considered quasi-suspect as closely as it scrutinizes suspect classifications. *See United States v. Virginia*, 518 U.S. 515, 531 (1996) (holding that classifications based on gender violate equal protection unless they are substantially related to an "exceedingly persuasive justification"). Whether or not the Court continues to collapse the top two tiers of the equal protection standard, it is clear that, at a minimum, sexual orientation classifications should be evaluated under some form of heightened scrutiny.

[40] Instead of specifying a rigid checklist, the Supreme Court has identified "several formulations" that "might

For the reasons discussed below, lesbians and gay men have all of these indicia of a suspect class and therefore merit strict scrutiny.

A. Lesbians And Gay Men Have Suffered A History Of Purposeful Unequal Treatment

Lesbians and gay men – like women and racial and ethnic minorities – historically have suffered, and today continue to suffer, broad-based discrimination.[41] The forms of this discrimination have changed over time, but group-based animosity toward lesbians and gay men has remained constant.[42]

In the 1950s, almost all gay people assumed that survival required them to hide their sexual orientation completely – from friends, from family and from co-workers. Thus, discrimination primarily took the form of exposing the sexual orientation of gay people and then harassing

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explain [its] treatment of certain classifications as 'suspect.'" *Plyler*, 457 U.S. 217 n.14.

[41] Every court that has addressed the question has concluded that gay men and lesbians have been subject to a history of discrimination. *High Tech Gays,* 895 F.2d at 573; *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); *see also Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari;* joined by Marshall, J.).

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

them and/or punishing them for their sexual orientation. For example, gay people – labeled "sex perverts" – were grouped with Communists as security risks. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1565 (1993). In 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all "sex perverts" from government employment. *Id.* at 1566.

During this time, police commonly raided gay bars and arrested patrons. Frightened of publicity, victims rarely challenged any charges. *Id.* at 1565. In addition, "[u]ntil 1965, homosexual aliens were excluded from admission into the United States as psychopaths under 8 U.S.C. section 1182(a)(4)," and for many years after that lesbians and gay aliens were still excluded as "sexual deviants." Tracey Rich, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 Ga. L. Rev. 773, 773 n. 4 (1988); *see also Boutilier v. INS*, 387 U.S. 118, 124 (1967) (upholding deportation because "Congress commanded that homosexuals not be allowed to enter.").

Over the last 40 years, more and more gay people have refused to hide their orientation. Honesty, however, has brought targeted discrimination. In a 2000 survey, three out of four gay, lesbian and bisexual respondents reported

that they had experienced prejudice and discrimination because of their sexual orientation.[43] Lesbians and gay men across the country have suffered employment discrimination in all types of workplaces, including schools, hospitals, the telephone company and police departments. *See, e.g, Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (lesbian high school coach in Utah fired from job because of her sexual orientation); *DeSantis v. Pacific Tel.*, 608 F.2d 327 (9th Cir. 1979)(California telephone company discriminated against lesbian and gay operators); *Miguel v. Guess,* 51 P.3d 89 (Wash. App. 2002) (lesbian x-ray technician in Washington hospital fired because of her sexual orientation); *Quinn v. Nassau County Police Dept.*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (gay New York police officer sexually harassed because of his sexual orientation).

Whether or not they attempt to hide their sexual

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[43] The Kaiser Family Foundation, *Inside-OUT: A Report On The Experiences Of Lesbians, Gays And Bisexuals In America And The Public's Views On Issues And Policies Related To Sexual Orientation* (Nov. *2001), available at www.kff.org/content/2001/3193/ LGBSurveyReport.pdf ("KFF Study"), at 3. See also* U.S. Surgeon General, *The Surgeon General's Call to Action To Promote Sexual Health And Responsible Sexual Behavior* ("Surgeon General's Call to Action")(July 9, 2001), available at http://www.surgeongeneral.gov/library/sexualhealth/call.htm , at 4 (reporting that American culture "stigmatizes homosexual behavior, identity and relationships").

identity, gay people are vulnerable to physical violence in this society. In a 2000 survey, one third of lesbian and gay respondents reported that they had been personally targeted for physical violence because of their sexual orientation.[44] Lesbians and gay men are among the leading targets of hate crimes in many communities. The FBI reported 8,063 bias motivated crimes in 2000, 16% of which targeted lesbians and gay men.[45] Moreover, studies have found that the bias murders of gay men and lesbians are characterized by "overkill," the use of "extraordinary violence such as multiple stab wounds, mutilation and dismemberment." Lori Rotenberk, *Study Links Homophobia, 151 Murders*, Chicago Sun-Times, Dec. 21, 1994, at 27. The serious social problem of anti-gay violence drew national attention in 1998 and 1999 after the gruesome bias murders of three men identified as gay by their murderers – Wyoming college student Matthew Shepard; Pfc. Barry Winchell, killed by fellow soldiers at Fort Campbell, Kentucky; and Billy Jack Gaither of Sylacauga, Alabama.[46]

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[44] KFF Study, at 4.

[45] Federal Bureau of Investigation, *Hate Crime Statistics 2000* (November 19, 2001), *available at* http://www.fbi.gov.pressrel/pressrel01/2000hc.htm.

[46] *See* Sue Anne Pressley, *2 Accused of Killing, Burning Gay Man*, WASHINGTON POST, March 5, 1999, at A01; *Soldier Sentenced to Prison - Man Pleads Guilty to Lesser Charge in*

Another especially painful form of discrimination endured by lesbians and gay men involves their intimate family life. Gay parents are often denied custody of their children, or subjected to burdensome restrictions or supervision of their visitation, simply because of their sexual orientation and irrespective of their parenting ability. *See, e.g.*, *Ex parte H.H.,* Ct. Civ. App. 2991129 (Ala. S.Ct. Feb. 15, 2002) (Moore, C.J., concurring) (concurring in denial of custody to lesbian mother on ground that "[h]omosexual conduct is…abhorrent, immoral, detestable, a crime against nature…a violation of the law of nature and of nature's God [and]…an inherent evil against which children must be protected"); *Weigand v. Houghton*, 730 So. 2d 581, 586-87 (Miss. 1999); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

The discrimination faced by lesbians and gay men, like the discrimination faced by other groups treated as suspect classes, is pervasive and destructive. This history of discrimination distinguishes lesbians and gay men from other groups that the United States Supreme Court has deemed non-suspect classes, such as close relatives and individuals 50 or older. *See*, *e.g.*, *Lyng v. Castillo*, 477

Killing of Barracks Mate Rumored to be Gay, AUGUSTA CHRON., Jan. 9, 2000, at A03.

U.S. 635, 638 (1986); *Murgia*, 427 U.S. at 313-14.

B. Sexual Orientation Is Unrelated to Ability To Perform In Or Contribute To Society

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

Both the American Psychiatric Association and the American Psychological Association have adopted resolutions stating that homosexuality is not correlated with any "impairment in judgment, stability, reliability or general social and vocational capabilities."[47]

Although the odious myth persists, there is no link between homosexuality and child molestation.[48] Nor is there

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[47] American Psychiatric Association, *Fact Sheet: Homosexual and Bisexual Issues* (February 2000), *available at* http://www.psych.org/news_stand/homosexual12.pdf; Brief *Amici Curiae* of the Massachusetts Psychological Association, et al. ("Mass. Psych. Ass'n Brief").

[48] *See, e.g.,* Carole Jenny, et al., *Are Children at Risk of Sexual Abuse by Homosexuals?*, 94 Pediatrics 44 (1994)(finding that only 0.7% of child sex abusers are

any evidence that being raised by a gay or lesbian parent has any negative effect on a child's healthy development. Indeed, the scientific research uniformly shows that children who have lesbian or gay parents are no different from other children with respect to their healthy development, *i.e.*, in terms of their self-esteem, psychological well-being, cognitive functioning and social adjustment.[49]

Likewise, the idea that being lesbian or gay is only about sex, whereas being heterosexual is much more multi-faceted, stems from erroneous prejudice, not from any true difference between lesbians and gay men, on the one hand, and heterosexuals on the other. Most gay people, like most heterosexuals, desire stable, loving relationships.[50] In a

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homosexual); Mass. Psych. Ass'n Brief. *See also* John Boswell, *Christianity, Social Tolerance and Homosexuality* at 16 (1980) (noting that accusations of child molestation have historically been made against disfavored minorities vulnerable to such "propaganda," be they gay people, Jews or others).

[49] *See, e.g.,* Judith Stacey and Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 161 (2001) (surveying the research); Child Welfare League of America, CWLA Standards Regarding Sexual Orientation of Applicants, and CWLA Policy Regarding Adoption by Lesbian and Gay Individuals, available in Ann Sullivan (ed.), *Issues in Gay and Lesbian Adoption: Proceedings of the Fourth Annual Pierce-Warwick Adoption Symposium* (1995); Ellen C. Perrin, M.D. and the Committee on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *Policy Statement: Coparent or Second Parent Adoption by Same Sex Parents*, 109 Pediatrics 339, 339 (Feb. 2002); *see also* Mass. Psych. Ass'n Brief.

[50] *See* Mass. Psych. Ass'n Brief.

2000 survey, 74% of lesbians and gay men said they would get legally married if they could, and more than one quarter were living with a partner as if they were married.[51]

In sum, sexual orientation has no bearing on a person's ability to perform in or contribute to society, and sexual orientation is not an accurate or appropriate proxy for anything else.[52] Therefore, "discrimination against homosexuals is 'likely…to reflect deep-seated prejudice rather than…rationality.'" *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (*quoting Plyler*, 457 U.S. at 216 n. 14)); *see Watkins*, 875 F.2d at 725 (Norris, J., concurring in judgment; joined by Canby, J.) ("[The] irrelevance of sexual orientation to the quality of a person's contributions to society…suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes…").

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[51] KFF Survey, at 4.

[52] This fact distinguishes sexual orientation from certain classes deemed non-suspect by the courts. *See, e.g., Cleburne*, 473 U.S. at 442 (mentally retarded not suspect class because, *inter alia*, they "have a reduced ability to cope with and function in the everyday world"); *see also Murgia*, 427 U.S. at 313 (individuals 50 or older not suspect class because, *inter alia*, they "have not…been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.").

C. Lesbians And Gay Men Are Uniquely Disadvantaged In The Political Arena

Although gay men and lesbians have become more visible politically in recent years, they still face significant obstacles in the political process and thus represent precisely the kind of powerless minority whom the *Carolene Products* Court sought to protect.

In a rational response to the history of irrational homophobia, many gay men and lesbians attempt to conceal their sexual orientation in a variety of contexts in order to avoid stigma, discrimination and violence.[53] Among other harmful consequences, this means that gay men and lesbians are deterred from political activism because they fear "expos[ing] themselves to the very discrimination they seek to eliminate." *Watkins*, 875 F.2d at 727 (Norris, J., concurring in judgment; joined by Canby, J.).

As Justices Brennan and Marshall observed, "because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari;* joined by Marshall, J.); *see also* Hon. Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What*

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

the Bork-Brennan Debate Ignores), 105 Harv. L. Rev. 80, 97-98 n. 51 (1991) (noting that, "although a minority cares passionately about an issue…it can sometimes only engage in the political process by identifying itself in ways that are physically or economically dangerous for it. The position of homosexuals in many parts of the country and that of blacks in the South for many years are obvious examples."). 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 involve." Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 731 (1985); *see also* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 U.C.L.A. L. Rev. 915, 970-73 (1989).

Moreover, lesbians and gay men are woefully underrepresented in this country's legislatures. A comparison to the situation of women in 1973, when gender classifications were found to warrant heightened scrutiny, is instructive. The plurality in *Frontiero v. Richardson*, 411 U.S. 677, 686 n. 17 (1973), premised its conclusion that "classifications based upon sex…are inherently suspect" on the fact that women were "vastly underrepresented." At the time, there had never been a woman president, there had never been a woman on the United States Supreme Court, there was not a woman in the United

States Senate (although there had been in the past), and there were only 14 women in the House of Representatives. If women were underrepresented in 1973, lesbians and gay men are virtually unrepresented in 2002. There have been no known lesbians or gay men on the Supreme Court; the first and only openly gay jurist to sit on the bench in any federal courthouse was appointed in 1994 to sit on a district court.[54] There has never been an openly gay president or member of the Senate. The only one of the elected offices mentioned in *Frontiero* that has ever been held by an openly gay person is that of member of the House, where only 5 have ever served.[55]

Not only are openly gay office holders virtually absent from the critical decision-making bodies that make, interpret and enforce laws that affect them, but they also are notoriously shunned by other constituencies. Non-gay individuals may avoid forming visible alliances with gay people – or even voting for legislation protecting the rights of lesbians and gay men – for fear of being perceived as homosexual. Halley, at 973 ("[t]hese legal and social prohibitions hobble everyone's discourse about

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[54] Chuck Colbert, *Sharper Focus: Honoring Harvard's "Judge Debbie," INNEWSWEEKLY, November 21, 2001*, available at http://www.innewsweekly.com/Pages /NewsArchive/news112101/chuck112101.htm.

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

gay rights, producing a process failure of constitutional magnitude").

The existence of legislation in some local jurisdictions protecting against sexual orientation discrimination in certain contexts does not mean that laws disadvantaging lesbians and gay men should not be subjected to strict scrutiny. Indeed, today women and most racial, ethnic and religious minority groups are protected from discrimination through state and federal laws. *See, e.g.,* 42 U.S.C. § 2000e. In fact, laws discriminating on the basis of race were found to deserve strict scrutiny after passage of a series of Civil Rights Acts, as well as widespread adoption of state anti-discrimination laws. Likewise, sex discrimination was found to deserve heightened scrutiny after Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963 and other federal laws prohibiting sex discrimination were passed. *See*, *e.g.*, *Frontiero*, 411 U.S. at 687-88 (plurality opinion). The existence of these protections did not stop the Supreme Court from determining that discrimination on the basis of race and sex must be subjected to heightened scrutiny. To the contrary, such protections constitute strong evidence that the legislature has acknowledged a history of purposeful unequal treatment. *See*, *e.g.*, *id.* (citing anti-discrimination legislation in support of conclusion that classifications based on gender must be subjected to

heightened scrutiny).[56] It follows that the far more limited protections for lesbians and gay men do not preclude strict scrutiny of classifications on the basis of sexual orientation.

When lesbians and gay men have achieved modest successes in the political arena, the response often has been to change the rules of the game in order to eliminate the benefits they have obtained. Specifically, the initiative and referendum process has been vigorously used to block legislative protection of lesbians and gay men.[57] Initiatives repealing sexual orientation anti-discrimination laws and prohibiting their future enactment were passed in Colorado and Maine, as well as in Cincinnati and several municipalities in Oregon and California.[58] Some of these initiatives went well beyond repealing existing non-discrimination laws to deny every branch of state and

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[56] In sharp contrast to these protections, no federal law expressly prohibits employment discrimination based on sexual orientation, and such discrimination remains lawful in the vast majority of state and local jurisdictions. *See* Human Rights Campaign, *Frequently Asked Questions on Sexual Orientation Discrimination*, *available at* http://www.hrc.org/worknet/nd/nd_facts.asp#3.

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

[58] See *id.*; The Data Lounge, *Maine Civil Rights Repeal*, available *at* http://www.datalounge.com/datalounge/issues/index.html?storyline=298; Lambda Legal Defense & Education Fund, *History of Anti-Gay Initiatives in the U.S.*, available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=16.

local government the power to adopt any form of protection for lesbians and gay men. Moreover, in Hawaii, Alaska and Nebraska, voters by referenda enacted state constitutional amendments precluding judicial review of discrimination in marriage against lesbians and gay men.[59] This extraordinary use of the political process to strip the government of the power to protect an unpopular minority mirrors the backlash against the civil rights laws of the 1960s, which took the form of state constitutional amendments that prohibited, or created barriers to the enactment of, laws barring racial discrimination in housing. *See Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erikson*, 393 U.S. 385 (1969).

As a result of the foregoing, as Justices Brennan and Marshall concluded, lesbians and gay men "are particularly powerless to pursue their rights openly in the political arena." *Rowland*, 470 U.S. 1014 (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.); *see also Watkins*, 875 F.2d at 727 (Norris, J., concurring in judgment; joined by Canby, J.) ("It cannot be seriously disputed…that homosexuals as a group cannot protect their right to be free from invidious discrimination by appealing to the political branches. The very fact that homosexuals have historically been underrepresented in and victimized

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

by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government.").

D. Even If Immutability Were Necessary – Which It Is Not – Sexual Orientation Is Sufficiently Immutable To Trigger Strict Scrutiny.

Although the United States Supreme Court has mentioned "immutability" in some of its heightened scrutiny cases, it never has held that only classes of persons with immutable traits can be deemed suspect. *See, e.g.*, *Cleburne*, 473 U.S. at 442 n. 10 (casting doubt on immutability theory); *id*. at 440-41 (stating the defining characteristics of suspect classes without mentioning immutability); *Murgia*, 427 U.S. at 313 (same); *Rodriguez*, 411 U.S. at 28 (same); *Lyng*, 477 U.S. at 638 (immutability is one of several disjunctive alternatives).

Even if it were necessary, however, immutability does not mean "genetic." Rather, it refers to a characteristic that is "unchosen and unalterable," Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1301, (1985), and "beyond the individual's control." *Cleburne*, 473 U.S. at 441 (explaining why illegitimacy is a suspect classification). *See also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000) ("immutable" means that the characteristic that defines the group "either cannot change, or should not be required to change because it is

fundamental to…individual identities or consciences.").[60] Sexual orientation is such a characteristic. *Id.* Although the origins of sexual desire are still unknown, there is consensus that a person's sexual orientation, homosexual or heterosexual, cannot be changed either by a simple decision-making process or by medical intervention.[61]

In short, lesbians and gay men have been the victims of harsh discrimination, and they cannot rely on the political process to address violations of their civil rights. As Justices Brennan and Marshall summarized:

> [H]omosexuals constitute a significant and insular minority of this country's population.

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[60] Moreover, immutability does not mean an absolute inability to change the class trait. Illegitimate children can be adopted; aliens can become naturalized; people can change their sex; and members of certain races and ethnic groups can "pass" as white or hide their national origin.

[61] *See, e.g.,* American Psychiatric Association, *Fact Sheet: Homosexual and Bisexual Issues* (February 2000), *available at* http://www.psych.org/news_stand/homosexual12.pdf ("There is no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation"); *Surgeon General's Call to Action* ("There is no valid scientific evidence that sexual orientation can be changed."); Mass. Psych. Ass'n Brief.

S*ee also Watkins*, 875 F.2d at 726 (Norris, J., concurring in judgment; joined by Canby, J.) (concluding that the theoretical mutability of sexual orientation does not present an obstacle to recognizing gay men and lesbians as a suspect class after posing the following thought experiment: "Would heterosexuals living in a city that passed an ordinance burdening those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?").

> Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely…to reflect deep seated prejudice rather than…rationality. State action against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.

Rowland, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari*, joined by Marshall, J.) (internal quotation marks omitted). Leading constitutional scholars agree that sexual orientation classifications merit strict scrutiny. *See* Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed.) (1988); John Hart Ely, *Democracy and Distrust* 162-64 (1980). Thus, in the unlikely event that it is necessary to reach the issue, *Amici* urge this Court to subject the defendants' application of Massachusetts' marriage laws to strict scrutiny.

CONCLUSION

The communities represented by *Amici* have experienced and understand discrimination. Applying Massachusetts' marriage laws to discriminate against lesbians and gay men is just as arbitrary and injurious as the inequalities that the marriage laws of the past worked on people of color, women and other disfavored minorities. And this discrimination is equally unconstitutional.[62] Just as courts across the country in the past were called upon to end, and did end, those painful and degrading forms of discrimination and denials of civil rights, *Amici* urge this Court to do the same here.

[62] *See Romer v. Evans*, 517 U.S. at 635 (holding that laws that "classif[y] homosexuals not to further a proper legislative end but to make them unequal to everyone else" and "stranger[s] to [the state's] laws" fail even the lowest level of scrutiny under the Constitution).

RESPECTFULLY SUBMITTED,

URBAN LEAGUE OF EASTERN MASSACHUSETTS; WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS; NATIONAL LAWYERS GUILD, MASSACHUSETTS CHAPTER; MASSACHUSETTS NOW; MASSACHUSETTS BLACK WOMEN ATTORNEYS; MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION; GREATER BOSTON CIVIL RIGHTS COALITION; FAIR HOUSING CENTER OF GREATER BOSTON; AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; PEOPLE FOR THE AMERICAN WAY FOUNDATION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC.; NORTHWEST WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, COMMUNITY CHANGE, INC.; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND; JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION; AND NATIONAL COUNCIL OF JEWISH WOMEN

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ADDENDUM

The American Civil Liberties Union Foundation (ACLU) is a non-profit, non-partisan corporation founded in 1920 for the purpose of maintaining and advancing civil liberties in the United States. It has over 300,000 members nationwide. The ACLU has a long history of legal advocacy to protect the rights of all citizens to equal protection under the law. In 1986, the ACLU created a Lesbian and Gay Rights Project (Project) to direct litigation to combat sexual orientation discrimination. The Project has participated in numerous state cases involving the protection of relationships formed between lesbians and gay men.

The American Civil Liberties Union of Massachusetts (ACLUM) is a non-profit organization of over 12,000 members, whose purpose is to defend and protect fundamental civil rights and civil liberties guaranteed by state and federal constitutions and laws. ACLUM has long been involved in litigation challenging discriminatory practices against protected classes and interference with the exercise of fundamental rights. These have included *Personnel Adminstrator v. Feeney*, 442 U.S. 256 (1979) (gender discrimination); *Adoption of Susan*, 416 Mass. 1003 (1993) (permitting joint adoption petition by two adults of same gender); *Massachusetts Electric Company v. Massachusetts Commission Against Discrimination* 375 Mass. 160 (1978) (pregnancy discrimination), *School Committee of Springfield v. Board of Education*, 366 Mass. 315 (1974) (race discrimination); and Jones v. Roe, 33 Mass. App. Ct. 660 (1992) (rejecting tradition of gender-based presumption in favor of father for surname of child).

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.

Community Change, Inc. (CCI), a non-profit, Boston-based organization founded in 1968, is dedicated to promoting racial justice and equity by challenging systemic racism and acting as a catalyst for anti-racist action and learning. CCI serves as a voice in the community to challenge policies and actions that result in discrimination. CCI is a catalyst for action through its educational work and its organizing of coalitions and change campaigns. CCI is an active resource center in support of those who are addressing institutional issues related to employment, economic justice, the justice system, equitable education and public policy as the concerns of racism intersect with the concerns of gender, class, age and sexual orientation.

The Fair Housing Center of Greater Boston is a non-profit organization whose mission is to promote equal housing opportunities for all people throughout the greater Boston area. While our goal of an open housing market may be elusive, we believe it is achievable. Yet it will ring hollow if, within those homes, only some Massachusetts residents are allowed to create families recognized and protected by the Commonwealth’s marriage laws while others remain second class citizens. We also note that Massachusetts recognizes both marital status and sexual orientation as protected classes in the housing context. Refusing to recognize same sex marriages in some ways undercuts that protection.

The Greater Boston Civil Rights Coalition (GBCRC) is a coalition of approximately 40 organizations and agencies representing various public, private, religious, ethnic and racial groups and neighborhoods in the greater Boston area. Founded in 1979, the mission of the GBCRC is to work for equitable, humanitarian and non-discriminatory treatment of all persons. We believe that the current application of Massachusetts marriage law relegates gay and lesbian residents of the Commonwealth to second class status, preventing them from joining together and raising their families in marriage for no reason other than the perpetuation of historical bias and persecution.

The Jewish Alliance for Law and Social Action (JALSA) is a Boston-based human rights organization inspired by

Jewish teachings and values and committed to social justice, civil rights, and civil liberties. Inheriting an 80 year old tradition of advocacy and pursuit of progressive public policy in the United States, the members of JALSA have written legislation and participated in litigation to end discrimination on the basis of race, gender, age, religion, national origin, and sexual orientation in employment, education, housing, and civil rights. JALSA is committed to removing all discrimination on the basis of sexual orientation.

Lambda Legal Defense and Education Fund (Lambda Legal) is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS, through impact litigation, education and public policy work. Founded in 1973, Lambda Legal now has five offices across the country, and is the largest and oldest legal organization devoted to these concerns. Lambda Legal was counsel in ***Baehr v. Miike*** and currently is counsel in ***Lewis v. Harris***, lawsuits brought in Hawaii and New Jersey on behalf of same-sex couples seeking the right to marry. Lambda Legal has had a formal Marriage Project since 1994 and has identified winning this right as one of the organization's top priorities.

The Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association (LCCR) is a non-profit law office that was founded in 1963 to provide free legal services to the victims of discrimination based on race or national origin. LCCR has been successful in some of the state's most important civil rights cases involving the desegregation of fire and police departments, school desegregation, housing discrimination and voting rights. LCCR has participated as ***Amicus curiae*** in numerous cases before the Supreme Judicial Court. The LCCR's clients are all too familiar with the destructive effects of discriminatory policies and the often decades long struggle to achieve equality through legislation. LCCR strongly believes the courts have a duty to protect all segments of American society in their quest for full social and civil rights.

The Massachusetts Association of Hispanic Attorneys is

a membership organization of over 100 attorneys whose goals are to assist the interests of the Hispanic community, to further equality under law for all and to promote equal access to justice.

The Massachusetts Black Women Attorneys was founded 21 years ago to promote and enhance the professional and community interests of black women in the legal profession. Among our goals are to promote and enhance the economic and political interests of black women; to improve and facilitate the fair and even-handed overall administration of law and justice, particularly as it applies to black women; and to advocate for the reform of the laws, ordinances, rules and regulations promulgated within or without the Commonwealth of Massachusetts to promote the interests of black women.

Massachusetts NOW (NOW) is the Massachusetts state chapter of the National Organization for Women. NOW is dedicated to making legal, political, social and economic change in our society in order to achieve our goal, which is to eliminate sexism and end all oppression. NOW considers this goal to include advocating for racial justice; economic justice; reproductive rights; civil rights for lesbians, bisexual women, and transgendered women; and the eradication of violence against women. NOW supports the right of same-sex couples to marry. Applying Massachusetts' marriage laws to include same-sex couples is a critical step toward full equality based on sex and gender.

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

The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan organization whose mission is to advance the legal and

civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy advocacy and community education on discrimination issues. The question presented by this case is of great interest to NAPALC because it implicates the availability of civil rights protections for Asian Pacific Americans in this country.

The National Association of Women Lawyers (NAWL), headquartered in Chicago, is over 100 years old. It was the first and is the oldest women's bar association in the United States. Its members consist of individuals as well as professional associations. Part of NAWL's mission is to promote the welfare of women, children and families in all aspects of society. Among the areas of interest to the organization are economic justice, reproductive rights and equal protection. NAWL supports equality in marriage for all who wish to commit to the marriage relationship. Given its interest in issues affecting women and families as a class, NAWL has participated as *Amicus* in many courts of the United States, including the United States Supreme Court.

The National Center for Lesbian Rights (NCLR) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbians and gay men and their families through a program of litigation, public policy advocacy, free legal advice and counseling, and public education. Since its founding in 1977, NCLR has played a leading role in protecting and securing fair and equal treatment of lesbian and gay parents and their children.

The National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has 90,000 members in over 500 communities

nationwide. Given NCJW's *National Principle*, which states that "Discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status or sexual orientation must be eliminated," as well as NCJW's *National Resolution* supporting "The enactment and enforcement of laws and regulations which protect civil rights and individual liberties for all," we join this brief.

The National Lawyers Guild, Massachusetts Chapter (NLGMC) was founded in 1937 as an alternative to the then conservative and racially segregated American Bar Association. It is a membership organization that brings together law students, lawyers, legal secretaries, paralegals, judges, and community activists to collaborate in the process of using the law for political, economic, and social justice. Over the last 60 years, the NLGMC has worked to advance human and civil rights and anti-war movements. We believe that this case presents a key issue of human rights for gay and lesbian residents of Massachusetts.

The National Organization for Women Foundation, Inc. (NOW Foundation) is the largest feminist organization in the United States, with over 500,000 contributing members in more than 500 chapters in all 50 states and the District of Columbia. Since its founding in 1986, a major goal of NOW Foundation 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 Foundation has supported numerous legal cases addressing the rights of lesbians and gay men. In particular, NOW Foundation 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 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 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.

NOW Legal Defense and Education Fund (NOWLDEF) is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for over thirty years. Expanding the rights of lesbians to be free from discrimination, and securing the rights of all women under state constitutions, are long-standing commitments of NOWLDEF.

People For the American Way Foundation (People For) is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has more than 600,000 members and supporters across the country, including in Massachusetts. People For has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of gay men and lesbians. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation, and conducts programs and studies directed at reducing problems of bias, injustice and discrimination. The instant case is of particular importance to People For because the decision of the court below erroneously failed to recognize the right of gay men and lesbians to participate fully in the institution of civil marriage, improperly condemning gay men and lesbians in Massachusetts to the status of second-class citizens.

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) is a national non-profit civil rights organization founded in 1972. It seeks to ensure the equal protection of the laws and to protect the civil rights of Latinos and/or immigrants through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *Amicus curiae* in numerous cases throughout the country concerning the proper

interpretation of the civil rights laws, including the equal protection and due process clauses of the United States Constitution.

The Women's Bar Association of Massachusetts (WBA) is a non-profit association of lawyers, judges, law professors and students, and other legal professionals, with over 1,200 members throughout Massachusetts. The WBA is committed to the full and equal participation of women in the legal profession and in a just society, and to that end supports the elimination of discrimination based on sex, sexual orientation, and marital status. The WBA joins with *Amici* in the arguments presented in this brief.

The Urban League of Eastern Massachusetts (ULEM) is an interracial, non-profit, community-based organization that provides programs of service and advocacy in the areas of education, career/personal development and employment for African Americans, other people of color and lower-income communities. Central to the mission of the ULEM is the removal of all barriers to full economic, political and social participation in society for the communities we serve. In working toward this goal, the ULEM, like the National Urban League, collaborates in civil rights-related coalitions and expresses its support for other groups that also advocate for civil rights. For that reason, the ULEM joins the other *Amici curiae* in supporting the Appellants.

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