NO. 10-16797

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TRACY COLLINS, et al.,
Plaintiffs-Appellees,

v.

JANICE K. BREWER, in her official capacity as
Governor of the State of Arizona, et al.,
Defendants-Appellants.

Appeal from United States District Court
for the District of Arizona
Civil Case No. 2:09-CV-02402 JWS
The Honorable John W. Sedwick

BRIEF OF *AMICI CURIAE* WINGSPAN AND ONE VOICE COMMUNITY CENTER SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMATION OF THE DISTRICT COURT DECISION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure ("FRAP"), Amicus Curiae Wingspan states that it is a non-profit organization, that it has no parent corporations, and that it does not issue any stock.

Pursuant to Rule 26.1, FRAP, Amicus Curiae One Voice Community Center, Inc. states that it is a non-profit organization, that it has no parent corporations, and that it does not issue any stock.

Dated: October 19, 2010.

Respectfully submitted,

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TABLE OF AUTHORITIES

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Andersen v. King County,
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Boutilier v. INS,
387 U.S. 118 (1967).. 10

Bowers v. Hardwick,
478 U.S. 186 (1986).. 8, 11

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 543, 440 (1985) . passim

Clark v. Jeter,
486 U.S. 456 (1988).. 16

Collins v. Brewer,
2010 U.S. Dist. LEXIS 74713 (D. Ariz. July 23, 2010)............................... 5

Craig v. Boren, 429 U.S. 190 (1976) 6

Dean v. District of Columbia,
653 A.2d 307 (D.D.C. 1995).. 21, 23

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati
860 F. Supp. 417 (S.D. Ohio 1994) 15, 22, 26

Florida Dep't of Children & Families v. In re: Matter of Adoption of X.X.G. and N.R.G., Case No. 3D08-3044,
2010 Fla. App. LEXIS 14014 (2010) 8

Frontiero v. Richardson,
411 U.S. 677 (1973).. 14, 17, 21, 22

Gill v. Office of Per. Mgmt.,699 F. Supp. 2d 37 (D. Mass. 2010) 6

Graham v. Richardson, 403 U.S. 365 (1971) 17

Hernandez v. Robles, 7 N.Y.3d 338 (N.Y. 2006) 22

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000) 19

High Tech Gays,
668 F. Supp. 1361 (N.D. Cal. 1987) 14

High Tech Gays, 895 F.2d 563 (9th Cir. 1990) ……………………………8, 13, 15

High Tech Gays v. Defense Indus. Sec. Clearance Office,
909 F.2d 375 (9th Cir. 1990) 20

In Re Marriage Cases, 183 P.3d 384 (Cal. 2008)... 20, 22

Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991).. 20, 23

Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005)... 20

Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008)............. 18, 21, 22

Korematsu v. United States, 323 U.S. 214 (1944) ……………………………6, 16

Lawrence v. Texas, 539 U.S. 558 (2003) 8, 11, 14

Lofton v. Kearny, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) 7

Lynch's Builders Rest. v. O'Connell, 303 N.Y. 408 (1952) 11

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).......................... 16

McLaughlin v. Florida, 379 U.S. 184 (1964) 16

Nyquist v. Mauclet, 432 U.S. 1 (1977) …………………………………………6,16

People v. Friede, 233 N.Y.S. 565 (Mag. Ct. 1929) 11

Perry v. Proposition 8 Official Proponents, 587 F.3d 947 (9th Cir. 2009)............ 13

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)...................... 7, 20

Plyler v. Doe, 457 U.S. 202 n.14 (1982).. 14, 21

Romer v. Evans, 517 U.S. 620 (1996).. 9, 26

Rowland v. Mad River Local School Dist., 470 U.S. 1009 (1985) 1, 12, 23

San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)................................. 16, 21

Thigpen v. Carpenter, 730 S.W.2d 510 (Ark. Ct. App. 1987)............................... 11

United States v. Carolene Prods., Co., 304 U.S. 144 n.4 (1938) 21

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)....................................... 18, 21, 22

Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989)......................... passim

Weigland v. Houghton, 730 So.2d 581 (Miss. 1999) 11

Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).................................. 9

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Arizona Revised Statutes § 38-651(O) (2010).. 1

Miss. Code Ann. § 93-17-3(5) (2010)... 12

Regulations

Exec. Order No. 10,450, § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1953)......................... 11

Other Authorities

Bruce A. Ackerman, *Beyond* Carolene Products*,* 98 Harv. L. Rev. 713 (1985) 23

Bryan Alexander, *The Bullying of Seth Walsh: Requiem for a Small-Town Boy*, TIME, Oct. 2, 2010, *available at* http://www.time.com/time/nation/article/0,8599,2023083,00.html ……………..13

American Psychiatric Association, *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies): Position Statement* (2000), http://www.psych.org/Departments/EDU/Library/APAOfficial DocumentsandRelated/PositionStatements/200001.aspx…………………………19

American Psychological Association, *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel* (2008), http://www.apa.org/pi/lgbc/publications/justthefacts.html 19

Gene Apodaca, *Parents Say Bullying Drove a 13-year-old To Suicide*, abc13.com, Sept. 29, 2010, *available at* http://abclocal.go.com/ktrk/story?section=news/local&id=7695982……………..13

M. V. Lee Badgett et al., The Williams Institute, *Bias in the Workplace*: *Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, Executive Summary, at 1 (2007)………………………………...25

Kara Brooks, *School Bullying Suicide: Bullied Greensburg Student Takes His Own Life*, Fox59.com, Sept. 13, 2010, *available at* http://www.fox59.com/news/wxin-greensburg-student-suicide-091310,0,1101685.story ………………………………………………………13

David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law,* 72 S. Cal. L. Rev. 1297, 1304-08 (1999)........................ 11

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) 23

Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. Times, Sept. 30, 2010, at A1 *available at* http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=all...13

Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability,* 8 B.U. Pub. Int. L.J. 219 (1999).. 10

James A. Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 L. & Sexuality 1, 75-76 (2001) …………10

Georgia Garvey, *Quietly breaking down barriers; Gay politicians find rising acceptance, but challenges still loom*, Chicago Tribune, Sep. 23, 2009, at Zone C, pg. 12 ………………………………………………………..25

Gay & Lesbian Leadership Institute, *Find a Leader*, *available at* http://www.glli.org/out_officials/view_all ……………………………..……passim

Gay, Lesbian and Straight Education Network, *2009 National School Climate Survey: Nearly 9 out of 10 LGBT Students Experience Harassment in School,* Sept. 14, 2010, *available at* http://www.glsen.org/cgi-bin/iowa/all/news/record/2624.html. For the full survey, *see* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-5.PDF ……………………………………………………………...………...12

"It Gets Better Project," *at* http://post.thestranger.com/seattle/ItGetsBetter/Page.html………………………13

Lambda Legal and Deloitte Financial Advisory Services LLP, *2005 Workplace Fairness Survey*, at 4-5 (2006)…………………………………….25

Lambda Legal, *An Unfulfilled Promise: Lesbian and Gay Inequality Under American Law*, available at http://data.lambdalegal.org/publications/downloads/fs_an-unfulfilled-promise.pdf ………………………………………… 25

Meredith Melnick, *It Gets Better: Wisdom from Grown-up Gays and Lesbians to Bullied Kids*, TIME Healthland, Sept. 27, 2010, *at* http://healthland.time.com/2010/09/27/it-gets-better-wisdom-from-grown-up-gays-and-lesbians-to-bullied-kids/ ……………...13

National Committee on Lesbian, Gay, and Bisexual Issues, National Association of Social Workers, *"Reparative" and "Conversion" Therapies for Lesbians and Gay Men: Position Statement* (2000), http://www.socialworkers.org/diversity/lgb/reparative.asp.......18

Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. Times, Dec. 3, 2009, at A1 *available at* http://www.nytimes.com/2009/12/03/nyregion/03marriage.html ………………..12

Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 Duke J. Gender L. & Pol'y 385 (May 2010)………………………………passim

Donald K. Sherman, *Sixth Annual Review of Gender and Sexuality Law: Child Custody and Visitation*, 6 Geo. J. Gender & L. 691 (2005)……………………....25

Matt Viser, *GOP blocks repeal of 'don't ask'; Filibuster stalls vote on military's gay rule*, The Boston Globe, Sep. 22, 2010, at National, pg. 1………………. ….25

Kenji Yoshino, *Covering,* 111 Yale L.J. 769 (2002) 23

Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays,* 96 Colum. L. Rev. 1753 (1996) 14

INTEREST OF AMICI CURIAE

The *amici curiae* are two non-profit community centers dedicated to providing support for lesbian, gay, bisexual and transgender ("LGBT") people[1] in Arizona. Wingspan, based in Tucson and established in 1988, provides an array of social, health and economic assistance programs to support the LGBT community. It also works to advance the rights of LGBT people through education and encouraging political action. One Voice Community Center, Inc. ("One Voice") in Phoenix, is only a year old, but it too supports the LGBT community by providing a central meeting space for LGBT groups, a hotline for those who are the victims of anti-LGBT violence or threats of violence, and liaisons to assist LGBT people in communicating with law enforcement.

Arizona Revised Statutes § 38-651(O) (2010) ("Section O") discriminates based on sexual orientation because it restricts family health insurance coverage to state employees' spouses and married couple's children. Gay and lesbian state employees are not permitted to marry their committed same-sex partners and therefore are denied any means of access to insurance for their partners and

[1] The *amici* are dedicated to the interests of lesbian, gay, bisexual and transgender people. This case only involves same-sex couples, but this brief cites as support some authorities that address LGBT people generally. This *amici* brief refers to "gay men and lesbians" (or gays and lesbians) to include gay, lesbian and bisexual people. Bisexuals are often subject to the same sorts of hostility facing lesbians and gay men. *See, e.g., Rowland v. Mad River Local School Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of cert.).

partners' children. Given their commitment to promoting the health and rights of LGBT people in this state, *amici* have an interest in supporting the Plaintiffs-Appellees' effort to defend the preliminary injunction presently enjoining enforcement of Section O.

The District Court appropriately recognized that Section O treats Arizona employees differently based on their sexual orientation, but declined to determine what level of review is appropriate for classifications based on sexual orientation, finding instead that an injunction was appropriate under rational basis review. In contrast, with respect to discrimination on other grounds, federal courts have traditionally ascertained what form of judicial scrutiny is warranted before conducting the equal protection analysis, rather than moving directly to and deciding the case under rational basis review, if possible. The refusal to determine the appropriate level of review and the application of rational basis review together send a signal that discrimination based on sexual orientation is perplexing, difficult to confront and/or not as serious as discrimination based on race, gender and other characteristics that has been found to warrant strict or heightened review. *Amici* are gravely concerned about this message because it encourages the discrimination, prejudice and anti-gay violence they are trying to eliminate.

SUMMARY OF ARGUMENT

The question of what level of scrutiny to apply under the Fourteenth Amendment's Equal Protection Clause to classifications based on sexual orientation is unanswered by the Supreme Court and unsettled in this Circuit. The District Court below sidestepped the question, although Plaintiffs had raised it, and instead applied rational basis review to preliminarily enjoin enforcement of Section O. While *amici* support affirmation of the preliminary injunction, they request that this Court decide that strict scrutiny applies to classifications based on sexual orientation and that under strict scrutiny, Section O should be enjoined.

This determination of the proper level of review is important because the ordinary practice is for courts, when addressing classifications based on race, national origin, gender, illegitimacy, alienage and others, to *first* determine the appropriate level of review, and *then* apply that standard of review. The District Court's mere application of rational basis review and its foregoing of the first usual step broke with long-standing constitutional law precedent, and treated gay men and lesbians differently from other classes. Put simply, this avoidance of the strict scrutiny inquiry sends a harmful message that discrimination against gay people is less serious than discrimination against other disfavored minority groups.

In addition, as the standard criteria for deciding whether classifications warrant heightened scrutiny make clear, sexual orientation classifications,

including Section O, warrant strict scrutiny. Indeed, it is well-settled that strict scrutiny applies to classifications where there is a history of purposeful unequal treatment of the class, and the classification has no relation to a person's ability to perform in, or contribute to, society. There is a wealth of evidence and court rulings that gay men and lesbians satisfy these two factors. Because these factors are met, classifications based on sexual orientation, like those based on race, national origin, and alienage, are "seldom relevant to the achievement of any legitimate state interest" and instead merely "reflect prejudice and antipathy - a view that those in the burdened class are not as worthy or deserving as others." *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 543, 440 (1985) (hereinafter, "*Cleburne*").

In addition, two other factors that courts occasionally employ in evaluating whether to apply strict scrutiny also support the application of strict scrutiny to sexual orientation-based classifications. First, it is widely accepted that sexual orientation is an immutable characteristic for purposes of this review, meaning it is a central trait of personhood that the government should not require a person to change as a condition of equal treatment. And second, gay people are relatively powerless vis-à-vis the majoritarian political process. Although some earlier decisions in other jurisdictions have been confounded by this part of the analysis, two points bear noting: (1) relative political powerlessness is only a warning

signal that strict scrutiny probably should apply, and not a requisite factor; and (2) like other groups delineated by classifications that are subject to heightened scrutiny, such as women and racial minorities, gay people have experienced only very limited political successes, a great many of which have been substantially overshadowed by political hostility. This history reinforces that, as compared to many other social groups, lesbians and gay men are relatively powerless politically and fall well within the strict scrutiny framework. For all of these reasons, *amici* request that the Court apply strict scrutiny to the anti-gay discrimination at issue here, and affirm the preliminary injunction against Section O.

ARGUMENT

I. THIS COURT SHOULD DECIDE THE PROPER STANDARD OF REVIEW FOR CLASSIFICATIONS BASED ON SEXUAL ORIENTATION.

Amici urge this Court to determine the appropriate standard of review for classifications based on sexual orientation. In this case, the District Court explicitly decided not to determine which level of review to apply to classifications based on sexual orientation, finding instead that it could resolve the case on rational basis review.[2] However, failing to identify which level of scrutiny should

[2] *Collins v. Brewer*, 2010 U.S. Dist. LEXIS 74713, at *14 (D. Ariz. July 23, 2010) ("Some form of heightened scrutiny might apply to plaintiffs' claims, but it is unnecessary to decide whether or which type of heightened scrutiny might apply . . . because [the] plaintiffs['] . . . equal protection claim . . . is plausible on its face even under the rational basis standard of review.").

apply to a classification based on sexual orientation before determining whether the classification can be sustained runs contrary to the courts' usual equal protection analysis and creates the misperception that rational basis is the appropriate standard of review.

A. **The District Court's Failure to Determine the Appropriate Level of Scrutiny to Apply to Sexual Orientation-Based Classifications Before Analyzing the Challenged Classification Is Inconsistent With the Standard Approach to Equal Protection Analysis.**

Under the Supreme Court's longstanding approach to challenges under the Equal Protection Clause, the Court first determines which level of scrutiny a classification deserves. That is, the Court does not merely ask whether the case can be resolved under rational basis review without first deciding whether rational basis review is indeed the proper standard for the classification at issue.[3]

Recent decisions involving sexual orientation classifications have broken with this tradition, however, by avoiding the question of which level of scrutiny is warranted where rational basis analysis can resolve the case.[4] Although *amici*

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3 *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[T]o begin with . . . all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (classifications of resident aliens should be strictly scrutinized).

4 *Gill v. Office of Per. Mgmt.*, 699 F. Supp. 2d 37 (D. Mass. 2010) (holding that the court "need not address" strict scrutiny arguments "because [the federal

believe that the Arizona statute must fail under rational basis review as well as strict scrutiny, failure to decide the appropriate level of review for sexual orientation-based classifications renders the analysis of these classifications incomplete and has serious, undesirable consequences for lesbian, gay and bisexual individuals.

B. Failure to Determine the Appropriate Level of Scrutiny For Sexual Orientation-Based Classifications Creates Uncertainty and Invites Discrimination.

While *amici* agree with the District Court that Section O cannot withstand even rational basis review, failure to decide the appropriate level of scrutiny for sexual orientation classifications has far-reaching implications for all governmental distinctions based on sexual orientation. Specifically, this failure is frequently, and incorrectly, interpreted to mean that the courts have decided rational basis is the appropriate standard.[5]

Defense of Marriage Act] fails to pass constitutional muster even under the highly deferential rational basis test"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (noting in *dicta* that strict scrutiny is the appropriate level of review, but applying rational basis to California's marriage restriction for same-sex couples).

[5] *See* Brief for Alliance Defense Fund, as Amici Curiae Supporting Petitioners, *Brewer v. Collins*, Dkt. #10, at 2, 5 (claiming that *High Tech Gays* "squarely" decides this question); *Lofton v. Kearny*, 157 F. Supp. 2d 1372, 1381-82 (S.D. Fla. 2001) (citing Justice Scalia's dissent in *Romer*, which mischaracterized the majority's opinion as deciding that only rational basis review applies to sexual orientation classifications, then applying that standard and upholding Florida's ban on adoption by gay men and lesbians); *but see Florida Dep't of Children & Families v. In re: Matter of Adoption of X.X.G. and N.R.G.*, Case No. 3D08-3044,

Not only does this failure to declare the proper standard of review leave litigants and other courts without guidance as to the applicable analysis, but it also, and more harmfully, signals that anti-gay discrimination is less important than other types of discrimination that are deemed presumptively suspect.

C. **<u>This Court Should Decide the Appropriate Level of Scrutiny to Apply to Classifications Based on Sexual Orientation.</u>**

The question of the proper level of review for sexual orientation-based classifications is unsettled in this Circuit. Although *High Tech Gays v. Defense Industrial Security Clearance Office*[6] held that sexual orientation classifications could not require strict scrutiny because same-sex intimacy could be criminalized,[7] relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Bowers* has long since been overturned. *Lawrence v. Texas*, 539 U.S. 558 (2003).[8] Consequently, the *High Tech Gays* conclusion is no longer sound law, and the question of the proper level

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2010 Fla. App. LEXIS 14014, 35 Fla. L. Weekly D 2107 (Fla. App. 2010) (applying rational basis review and holding that Florida's anti-gay adoption restriction violates state constitution's equal protection guarantee without analyzing whether strict scrutiny applies to sexual orientation classifications).

[6] 895 F.2d 563 (9th Cir. 1990).

[7] "[B]ecause homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes." *High Tech Gays*, 895 F.2d at 571.

[8] "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. 558 at 578.

of scrutiny for sexual orientation classifications is unanswered in this Circuit.[9] At the very least, this Court should clarify that the question remains open, thereby reducing the harms that result from the mistaken assumption that the answer is decidedly rational basis review.

II. SEXUAL ORIENTATION-BASED CLASSIFICATIONS DEMAND THE EXACTING ANALYSIS OF STRICT SCRUTINY.

The Supreme Court has held that classifications on the basis of a characteristic merit strict scrutiny when two essential criteria are met: 1) that the group disfavored by the classification has been the target of a long history of invidious discrimination; and 2) that the characteristic that distinguishes the group bears no relation to the group members' ability to contribute to society. To the extent that the immutability of a given trait and the relative political powerlessness of the group defined by that trait are present, they provide additional justification for applying strict scrutiny. All of these factors are present in the case of anti-gay classifications (as discussed in parts A through D of this section), and therefore this

[9] The level of scrutiny was not decided in *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court only noted that the discriminatory amendment at issue in the case "defie[d]" and "confound[ed]" rational review. Likewise, *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), did not decide the level of scrutiny because Major Witt raised a limited equal protection claim that does not parallel the equal protection claim in the present case. Unlike the claim in this case, Witt's narrow equal protection claim arose in the context of the military, where governmental interests in national security are particularly strong.

Court should hold that strict scrutiny is the proper level of review for classifications based on sexual orientation.

A. Gay Men and Lesbians Have Been Subject to a History of Discrimination Because of Their Sexual Orientation.

For more than a century and through the present day, lesbians and gay men have suffered pervasive and irrational discrimination due to their sexual orientation. Numerous courts, including the Ninth Circuit, have recognized this history of virulent discrimination.

1. Lesbians and Gays Have Long Suffered Discrimination in Both the Public and Private Spheres.

Until 1973, discrimination against lesbians and gay men was justified by the erroneous classification of homosexuality as a mental illness.[10] *See Boutilier v. INS*, 387 U.S. 118 (1967) (holding that "psychopathic personality" exclusion in immigration law applied to homosexual persons); *see also* James A. Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 L. & Sexuality 1, 75-76 (2001) (describing the involuntary commitment of homosexuals to mental institutions in the 1960s under inhumane

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[10] Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. Pub. Int. L.J. 219, 221 (1999) (noting that the American Psychiatric Association did not remove homosexuality from the Diagnostic and Statistical Manual of Mental Disorders II until 1973).

conditions due to the false belief that they were "sex deviate[s]"). Efforts to "cure" homosexuality were often sadistic and torturous.[11]

Lesbians and gay men have also, for many years, experienced pervasive discrimination in public and private spheres, including with respect to their rights of association;[12] speech;[13] employment;[14] parenting;[15] military service;[16] and private, consensual intimacy.[17]

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[11] *See* David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. Cal. L. Rev. 1297, 1304-08 (1999) (describing "medical attempts . . . to extinguish homosexuality" via extreme measures, including lobotomies and castration).

[12] *See, e.g., Lynch's Builders Rest. v. O'Connell*, 303 N.Y. 408 (1952) (upholding revocation of liquor licenses for bars where gay people gathered).

[13] *See, e.g., People v. Friede*, 233 N.Y.S. 565, 567 (Mag. Ct. 1929) (book portraying same-sex affection is "anti-social" and "perverted").

[14] *See, e.g.,* Exec. Order No. 10,450, § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1953) (President Eisenhower's executive order requiring termination of all gay and lesbian federal employees). *See also Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 433 (2008) (citing G. Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* 6 (2004)) (noting that during the "McCarthy witch-hunt," thousands of public employees were discharged because they were suspected of being gay or lesbian).

[15] *See, e.g., Thigpen v. Carpenter*, 730 S.W.2d 510 (Ark. Ct. App. 1987) (finding that lesbian mother's sexual orientation was sufficient to warrant a change in custody); *Weigland v. Houghton*, 730 So.2d 581, 586 (Miss. 1999) (denying father custody because his "homosexual activity may . . . have an adverse effect upon" the child).

[16] *See, e.g.,* "Policy concerning homosexuality in the armed forces," 10 U.S.C. § 654 (2010) (enacted in 1993, removing a member of the armed forces from service if he or she has "engaged in a homosexual act" or "stated that he or she is a homosexual or bisexual").

[17] *Lawrence*, 539 U.S. at 570 (discussing state statutes that "singled out same-sex relations for criminal prosecution"); *see also Bowers*, 478 U.S. at 192-93 (rejecting constitutional challenge to state statute criminalizing same-sex sodomy

2. **Virulent Discrimination Based on Sexual Orientation Continues Today.**

Discrimination based on sexual orientation is not confined to the past. Federal and state laws continue to discriminate against gay people today by refusing to recognize their relationships,[18] barring them from serving openly in the military,[19] and restricting their ability to adopt children.[20] In addition, recent news stories and empirical studies demonstrate the tragic consequences of anti-gay animus for the nation's youth. A 2009 survey found that 84.6% of LGBT students reported being verbally harassed, 40.1% reported being physically harassed, and 18.8% reported being physically assaulted at school in the past year because of their sexual orientation.[21] Within the last month alone, there have been at least four documented suicides of gay teenagers who had been bullied by their peers on

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and noting that as of 1986, "24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults").

[18] *E.g.,* Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. Times, Dec. 3, 2009, at A1 *available at* http://www.nytimes.com/2009/12/03/nyregion/03marriage.html (reporting that "New York State Senate decisively rejected a bill . . . that would have allowed gay couples to wed").

[19] 10 U.S.C. 654 (2010) (known as the "Don't Ask Don't Tell" policy).

[20] *E.g.,* Miss. Code Ann. § 93-17-3(5) ("[A]doption by couples of the same gender is prohibited.").

[21] Gay, Lesbian and Straight Education Network, *2009 National School Climate Survey: Nearly 9 out of 10 LGBT Students Experience Harassment in School,* Sept. 14, 2010, *available at* http://www.glsen.org/cgi-bin/iowa/all/news/record/2624.html. For the full survey, *see* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-5.PDF.

account of their sexual orientation,[22] further demonstrating the severe and pervasive nature of hostility toward gay people.

3. **This Court and Others Have Recognized the History of Invidious Discrimination Against Gay Men and Lesbians.**

The Ninth Circuit has already acknowledged that "homosexuals have suffered a history of discrimination" in *High Tech Gays*, 895 F.2d at 573; *see also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (agreeing with *High Tech Gays* on this point).

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[22] Bryan Alexander, *The Bullying of Seth Walsh: Requiem for a Small-Town Boy*, TIME, Oct. 2, 2010, *available at* http://www.time.com/time/nation/article/0,8599,2023083,00.html (Seth Walsh, age 13); Kara Brooks, *School Bullying Suicide: Bullied Greensburg Student Takes His Own Life*, Fox59.com, Sept. 13, 2010, *available at* http://www.fox59.com/news/wxin-greensburg-student-suicide-091310,0,1101685.story (Billy Lucas, age 15); Gene Apodaca, *Parents Say Bullying Drove a 13-year-old To Suicide*, abc13.com, Sept. 29, 2010, *available at* http://abclocal.go.com/ktrk/story?section=news/local&id=7695982 (Asher Brown, age 13); Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. Times, Sept. 30, 2010, at A1 *available at* http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=all (Tyler Clementi, age 18). In response to these tragic incidents, numerous lesbian and gay adults have compiled a collection of video messages reassuring youths who are suffering from anti-gay bullying. "It Gets Better Project," *at* http://post.thestranger.com/seattle/ItGetsBetter/Page.html. *See also* Meredith Melnick, *It Gets Better: Wisdom from Grown-up Gays and Lesbians to Bullied Kids*, TIME Healthland, Sept. 27, 2010, *at* http://healthland.time.com/2010/09/27/it-gets-better-wisdom-from-grown-up-gays-and-lesbians-to-bullied-kids/ (describing the "It Gets Better" project as "an oral history of ostracism and discrimination, and evidence of the fact that in many parts of the country, change is slow in coming").

The Supreme Court has also recognized the history of discrimination against gay people. *See, e.g.*, *Lawrence*, 539 U.S. at 571 (". . . for centuries there have been powerful voices to condemn homosexual conduct as immoral"); *see also* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev. 1753, 1772 (1996) (noting that every court to consider heightened scrutiny for classifications based on sexual orientation has concluded that gays and lesbians have been subject to a history of discrimination).

B. Sexual Orientation is Unrelated to One's Ability to Contribute to, and Perform in, Society.

Strict scrutiny applies to government classifications that disfavor or discriminate against a group of people based on a characteristic that bears "no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (plurality); *see also Cleburne*, 473 U.S. at 440-41. The import of this factor is that when a classification is based on a characteristic unrelated to a person's ability, the classification is not the result of "legislative rationality in pursuit of some legitimate objective" but rather, a reflection of "deep-seated prejudice." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

Federal courts, including in this Circuit, have long recognized that sexual orientation is unrelated to a person's ability to contribute to society. *E.g.*, *High Tech Gays*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987) ("The American Psychological Association has declared that 'homosexuality per se implies no

impairment in judgment, stability, reliability, or general social or vocational capabilities.'"), *rev'd in part, vacated in part and remanded*, 895 F.2d 563 (9th Cir. 1990); *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) ("[S]exual orientation plainly has no relevance to a person's ability to perform or contribute to society.") (citation omitted).[23] The State of Arizona likewise takes this position with respect to its employees. *See* Arizona Executive Order No. 2003-22.

C. A Trait Need Not Be Immutable For Strict Scrutiny to Apply, But the Application of Strict Scrutiny to Sexual Orientation Classifications Is Further Justified Because Sexual Orientation Is an Immutable – Meaning Deeply Rooted and Not Easily Changed – Trait.

It is not essential that a trait be immutable for strict scrutiny to apply, but the fixed nature of a trait can reinforce the need for heightened scrutiny, by highlighting the invidiousness of discrimination on the basis of that trait. Importantly, for equal protection purposes, immutability refers not to a person's genetic make-up, but rather to an inherent trait that cannot be altered without difficulty such that the government should not require a person to change it to avoid discrimination. The medical and mental health professions and numerous

[23] *See also Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (hereinafter "*Equality Found.*"), 860 F. Supp. 417, 437 (S.D. Ohio 1994) ("Sexual orientation, whether hetero-, homo-, or bisexual, **bears no relation whatsoever** to an individual's ability to perform, or to participate in, or contribute to, society."), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *cert. granted and vacated by* 518 U.S. 1001 (1996) (emphasis added).

courts, including this Circuit, have all recognized that, consistent with this definition, sexual orientation is immutable.

1. **Immutability Reinforces the Applicability of Heightened or Strict Scrutiny, But It Has Never Been an Absolute Prerequisite for Heightened or Strict Scrutiny.**

The Supreme Court has never held that immutability is a requirement for determining that a classification is suspect.[24] Indeed, when the Court first declared racial classifications suspect in *Korematsu*, 323 U.S. 214, it did not even mention immutability in its analysis.[25] Later, when the Court applied strict scrutiny to invalidate a racial classification in *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964), it referred simply to the Fourteenth Amendment's "central purpose." Although *McLaughlin* focused on race, later decisions have, of course, applied Fourteenth Amendment-based heightened scrutiny to classifications based on sex, illegitimacy, and other traits, all without discussion of immutability. *See e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Nyquist*, 432 U.S. 1 (applying strict

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[24] *See Watkins*, 875 F.2d at 725 (Norris, J., concurring) ("The Supreme Court has never held that only classes with immutable traits can be deemed suspect.").

[25] The Court has also, on several other occasions, omitted mention of immutability when listing the factors relevant to finding that a classification is suspect. *San Antonio Sch. Dist. v. Rodriguez* (hereinafter, "*Rodriguez*"), 411 U.S. 1, 28 (1973) (holding that a suspect 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"). This definition, omitting immutability, was reiterated in *Massachusetts Bd. of Retirement v. Murgia* (hereinafter, "*Murgia*"), 427 U.S. 307 (1976); *see also Cleburne*, 473 U.S. 432.

scrutiny to a classification of resident aliens even though that status was voluntary and changeable); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

Indeed, the reason courts refer to immutability at all is to reinforce the point that the "imposition of special disabilities" because of a characteristic that would be unreasonably difficult to change "would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 686. This is true for sexual orientation as well as the other traits already recognized by the Supreme Court as grounds for invidious, suspect discrimination.

2. **An "Immutable" Characteristic Is a Central Trait of Personhood that the Government Should Not Coerce a Person To Change.**

For equal protection purposes, "immutability" does not mean that a person is absolutely unable to change the characteristic. *See Watkins*, 875 F.2d at 726 (Norris, J., concurring). Rather, "immutability" refers to a central, defining trait of personhood that a person should not be required to change to avoid discrimination. Indeed, classifications based on characteristics such as alienage, illegitimacy, gender, and race are subjected to strict or heightened scrutiny even though aliens can become citizens, illegitimate children can be legitimated, a person's sex can be changed with medical intervention, and traits related to one's race can be changed via pigment injections, surgery or hair treatments. *Id*.

Courts have considered a trait "immutable" when altering it would "involve great difficulty, such as requiring a major physical change or a traumatic change of identity," or when the trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." *Id.* at 726; *see also Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009) (A finding that "sexual orientation is central to personal identity and 'may be altered [if at all] only at the expense of significant damage to the individual's sense of self'" is sufficient to determine that sexual orientation is an immutable characteristic.) (quoting *Kerrigan*, 957 A.2d at 438-39).

3. **<u>The Consensus Among Mental and Behavioral Health Organizations Is that Efforts To Change Sexual Orientation Are Destructive and Unethical.</u>**

The consensus among mental and behavioral health organizations is that a person's sexual orientation cannot be changed by a simple decision-making process or by psychological or medical intervention.[26] Moreover, the medical community has concluded overwhelmingly that attempts to "cure" people of homosexuality through so-called "reparative" therapies are not only futile, but

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[26] *See, e.g.*, National Committee on Lesbian, Gay, and Bisexual Issues, National Association of Social Workers, *"Reparative" and "Conversion" Therapies for Lesbians and Gay Men: Position Statement* (2000), http://www.socialworkers.org/diversity/lgb/reparative.asp ("[R]eparative or conversion therapies . . . cannot and will not change sexual orientation. . . . [S]uch treatment potentially can lead to severe emotional damage.")

potentially harmful. For example, "the American Psychiatric Association opposes any psychiatric treatment, such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that the patient should change his/her sexual homosexual orientation. . . . The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior . . . ."[27]

4. **This Circuit and Other Courts Have Concluded that Sexual Orientation Is an Immutable Trait, Meaning Central to Identity and Not Something One Should Be Required to Change.**

The Ninth Circuit has already determined that "sexual orientation and sexual identity are immutable" and "so fundamental to one's identity that a person should not be required to abandon them." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (addressing membership in a discriminated-against social group as a basis for asylum). *Accord High Tech Gays v. Defense Indus. Sec.*

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[27] American Psychiatric Association, *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies): Position Statement* (2000), http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx; *see also* American Psychological Association, *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel* (2008), http://www.apa.org/pi/lgbc/publications/justthefacts.html ("[C]ounseling and psychotherapy aimed at eliminating or suppressing homosexuality . . . are based on a view of homosexuality that has been rejected by all the major mental health professions. . . . [which] have all taken the position that homosexuality is not a mental disorder and thus is not something that needs to or can be 'cured.'")

Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("When the government discriminates against homosexuals, it is discriminating against persons because of what they are, through no choice of their own, and what they are unable to change."). This Court has further acknowledged that "'homosexuality is as deeply ingrained as heterosexuality'" and "'one should not attempt or expect to change it'" but should "'recognize it as a basic component of a person's core identity.'" *Id.* (citation omitted).

Other courts have likewise found that sexual orientation is "immutable," consistent with this precedent.[28] Accordingly, the overwhelming evidence and court precedent that sexual orientation is an "immutable" characteristic reinforce the conclusion that strict scrutiny should apply to classifications based on sexual orientation.

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[28] *See, e.g.*, *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005); *Perry*, 704 F. Supp. 2d at 966 (after extensive trial evidence, finding that "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation"); *Jantz v. Muci*, 759 F. Supp. 1543, 1547 (D. Kan. 1991) (same), *rev'd on other grounds*, 876 F.2d 623 (10th Cir. 1992); *In Re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation . . . to avoid discriminatory treatment.").

D. Gays and Lesbians Suffer Ongoing Political Vulnerabilities.

The "political powerlessness" factor determines whether unchecked prejudice against a "discrete and insular" minority "curtail[s] 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). The inquiry is not, however, about *absolute* powerlessness.[29] Rather, courts test whether, due to the deep-seated prejudices against the group, it cannot rely on the political process to prevent or redress discrimination.[30] The relative nature of this inquiry is

[29] *Frontiero* illustrates the point, as it determined that classifications based on gender are inherently suspect and warrant heightened scrutiny even though (1) "the position of women in America has improved markedly in recent decades"; (2) key protective legislation had been enacted; and (3) "women do not constitute a small and powerless minority." 411 U.S. at 685-86 & n.17. *Accord Kerrigan*, 957 A.2d at 444 (stating that "political powerlessness is clearly a misnomer," and the actual test is whether "because of the pervasive and sustained nature of the discrimination that its members have suffered, there is a risk that that discrimination will not be rectified, sooner rather than later, merely by resort to the democratic process.") (citing *Cleburne*, 473 U.S. at 440); *see also Varnum*, 763 N.W.2d at 894 (stating that all that is required under state law is an analysis of "whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means" and not absolute powerlessness); *Dean v. District of Columbia*, 653 A.2d 307, 349 (D.D.C. 1995) (Ferren, A.J., dissenting in part) (a holding that classifications based on sexual orientation should not be strictly reviewed because there are some openly gay and lesbian legislators and some laws protecting gay people would contradict U.S. Supreme Court precedent requiring only relative political powerlessness) (citing *Plyler*, 457 U.S. at 216-17 n.14).

[30] *See Rodriguez*, 411 U.S. at 28; *Carolene Prods.*, 304 U.S. at 152-53, n.4. *Watkins*, 875 F.2d at 727 (Norris, J., concurring) ("The very fact that homosexuals have historically been underrepresented in and victimized by political bodies is

underscored by the fact that classifications continue to receive heightened scrutiny even as the vulnerable group makes some political gains.[31]

To determine relative powerlessness, courts have examined the class's representation in law-making institutions,[32] and whether the group is able to obtain lawmakers' respect and concern for its needs,[33] though relative lack of political power may not be "readily discernible nor easily measurable."[34] Even without an agreed formula for the inquiry, by any relevant measure gay people suffer from a

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

[31] *See In re Marriage Cases*, 183 P.3d at 443 ("Indeed, if a group's current political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications."); *see also Cleburne*, 473 U.S. at 467 (Marshall, J., concurring in the judgment in part and dissenting in part) ("The Court . . . has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject.").

Indeed, the existence of some protective legislation may **support** application of strict scrutiny because it is evidence of the continuing, severe discrimination against the group. *Hernandez v. Robles*, 7 N.Y.3d 338, 388-89 (N.Y. 2006) (Kaye, C. J., dissenting) (Congress's passage of statutes intended to eliminate gender discrimination "acknowledge — rather than mark the end of — a history of purposeful discrimination.").

[32] *E.g.*, *Frontiero*, 411 U.S. at 686 n.17; *Equal Found.*, 860 F. Supp. at 439 (observing that openly gay people were almost entirely absent from the nation's decisionmaking councils, as were women at the time of *Frontiero*).

[33] *E.g.*, *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in part and dissenting in part).

[34] *Kerrigan*, 957 A.2d at 441 (quoting *Equality Found.*, 860 F. Supp. at 437 n.17); *Varnum*, 763 N.W.2d at 893-94.

degree of political vulnerability that renders them unable reliably to protect their interests through the majoritarian process.

1. **Gays and Lesbians Have Difficulty Employing the Political Processes Due to Societal Pressure to Conceal Homosexuality.**

Violence and discrimination against openly gay and lesbian individuals imposes great social, economic and political pressure on gays and lesbians to conceal their sexual orientation.[35] This greatly impedes their ability to use the political process to redress discrimination.[36] "Ironically, by 'coming out of the closet' to protest against discriminatory legislation and practices, homosexuals expose themselves to the very discrimination they seek to eliminate. As a result, the voices of many homosexuals are not even heard, let alone counted."[37]

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[35] *E.g.*, Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 811-36 (2002); 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).

[36] *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of certiorari; joined by Marshall, J.).

[37] *Watkins*, 875 F.2d at 727 (Norris, J., concurring) (Canby, J., joining in Judge Norris's concurrence) (quotation and citation omitted); *see also Dean*, 653 A.2d at 349 (Ferren, A.J., dissenting in part); *Jantz*, 759 F. Supp. at 1550; Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 730-31 (1985) (stating that gay people face a greater barrier to political presence because each individual has to "come out of the closet" before engaging in political activity).

2. **Gays and Lesbians Are Underrepresented in the Nation's Decisionmaking Councils.**

Few openly gay people hold political office compared to their representation in the population as a whole.[38] It is estimated that lesbians and gay men constitute five to ten percent of the population,[39] yet there are only three openly LGBT members of Congress—just .69% of congressional members.[40] No openly LGBT person has ever served in the U.S. Senate, on the U.S. Supreme Court or as President.[41] Across the nation, only approximately 445 of the more than 500,000 elected officials are openly LGBT.[42]

This lack of representation in the nation's lawmaking institutions stymies the gay and lesbian community's ability to obtain passage of legislation addressing its needs.[43] Openly gay or lesbian legislators are more likely to introduce and to support measures to address the needs of their community.[44]

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38 *Andersen v. King County*, 138 P.3d 963, 1030 (Wash. 2006) (Bridge, J., dissenting).

39 *See* Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny* (hereinafter "Powers"), 17 Duke J. Gender L. & Pol'y 385, 388 & n.41 (May 2010).

40 *Id.* at 394-95; *see also* Gay & Lesbian Leadership Institute, *Find a Leader*, *available at* http://www.glli.org/out_officials/view_all (hereinafter, the "Out Officials").

41 *Id.*; *see also* Out Officials.

42 Powers, at 394.

43 *Id.* at 392.

44 *Id.* at 392-93 (noting that LGBT legislators rely on each other "to build the support necessary to pass legislation designed to benefit and protect LGBTs.").

3. **Lesbians and Gay Men Have Been Unable To Secure Many Basic Protections Through the Political Process.**

In addition to a lack of representation in government, gays and lesbians have been unable to redress policies that discriminate against them in a number of arenas, including military service,[45] custody of children,[46] adoption,[47] and marriage.[48] Surveys demonstrate there are insufficient government safeguards to protect gays and lesbians from harassment.[49] Voters also repeatedly have passed

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Rising acceptance of gays and lesbians "doesn't always translate to legislative support." Georgia Garvey, *Quietly breaking down barriers; Gay politicians find rising acceptance, but challenges still loom*, Chicago Tribune, Sep. 23, 2009, at Zone C, pg. 12 (quoting an openly gay state legislator: "It is a big step from being tolerant of gay people for some of my colleagues to decide about voting for equal rights for us.").

[45] *See* Matt Viser, *GOP blocks repeal of 'don't ask'; Filibuster stalls vote on military's gay rule*, The Boston Globe, Sep. 22, 2010, at National, pg. 1.

[46] Donald K. Sherman, *Sixth Annual Review of Gender and Sexuality Law: Child Custody and Visitation*, 6 Geo. J. Gender & L. 691, 706-10 (2005) (surveying states in which a parent's homosexuality may or will negatively affect custody or visitation).

[47] Powers, at 396 n.85 (citing four statutes prohibiting same-sex couples from jointly petitioning to adopt).

[48] *See* 1 U.S.C. § 7 ("Defense of Marriage Act"). Voters in 29 states have passed constitutional bans on marriage for same-sex couples, and restrictions on same-sex couples' freedom to marry now exist in more than forty states. Lambda Legal, *An Unfulfilled Promise: Lesbian and Gay Inequality Under American Law*, available at http://data.lambdalegal.org/publications/downloads/fs_an-unfulfilled-promise.pdf; *see also* Powers, at 393 n.70.

[49] Lambda Legal and Deloitte Financial Advisory Services LLP, *2005 Workplace Fairness Survey*, at 4-5 (2006) (finding that 39% of LGBT employees experienced discrimination based on sexual orientation, and 11% reporting frequent harassment); *see also* M. V. Lee Badgett et al., The Williams Institute, *Bias in the Workplace*: *Consistent Evidence of Sexual Orientation and Gender*

measures to prohibit legislators from enacting laws to protect gays and lesbians from discrimination.[50]

This backdrop of unequal treatment illustrates powerfully that lesbians and gay men face systemic, unjust barriers to protecting their interests through the political process as others are able to do. Strict scrutiny is not only warranted but necessary to safeguard this vulnerable minority against majoritarian enactments of anti-gay prejudice into law in a manner that flouts the equal protection promise made to all Americans.

III. CONCLUSION.

For all of the foregoing reasons, *amici* urge the Court to affirm the injunction against enforcement of Section O based on strict scrutiny review.

Identity Discrimination, Executive Summary, at 1 (2007) (stating that 12% to 30% of heterosexual employees surveyed witnessed discrimination against their colleagues based on sexual orientation).

[50] *Romer*, 517 U.S. 620; *Equality Found.*, 860 F. Supp. at 439 ("It is also significant that of the 38 Issue 3-type ballot initiative [barring minority or protective status based on sexual orientation] campaigns waged in communities across the country, 34 were approved by voters.").

RESPECTFULLY SUBMITTED this 19th day of October, 2010.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has typeface of 14 points or more and contains 6,755 words.

October 19, 2010

/s/ Sarah R. Anchors
Sarah R. Anchors

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2010, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF System.

I further certify that not all participants in the case are registered CM/ECF users. I have mailed the foregoing Brief of Amici Curiae by First Class Mail, postage prepaid, to the following non-CM/ECF participant:

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