IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 07-1499
Dist. Ct. No. CV5965

KATHERINE VARNUM, ET AL.,

Plaintiffs/Appellees,

vs.

TIMOTHY J. BRIEN, POLK COUNTY RECORDER

Defendant/Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE ROBERT J. HANSON

BRIEF OF AMICI CURIAE ONEIOWA; THE IOWA CHAPTERS OF PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS; THE EQUAL JUSTICE SOCIETY; THE NATIONAL BLACK JUSTICE COALITION; THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; THE ZUNA INSTITUTE; THE ASIAN AMERICAN JUSTICE CENTER; THE SOUTHERN POVERTY LAW CENTER; PEOPLE FOR THE AMERICAN WAY FOUNDATION; THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; AND THE IMMIGRANTS' RIGHTS PROGRAM OF THE AMERICAN FRIENDS SERVICE COMMITTEE

Ivan T. Webber
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309-2231
Telephone: 515/243/7611
Facsimile: 515/243-2149
Email: iwebber@ahlerslaw.com

Tobias Barrington Wolff
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104
Telephone: 215/898-7471
Facsimile: 215/573-2025
E-mail: tobiaswolff@mindspring.com

TABLE OF CONTENTS

CERTIFICATE OF FILING

I, Ivan T. Webber, hereby certify that eighteen (18) copies of the Amici Curiae were hand-delivered on March 28, 2008 to the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, Iowa 50319.

Ivan T. Webber (AT0008315)
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309-2231
Telephone: 515/243-7611
ATTORNEYS FOR PLAINTIFFS-APPELLEES

CERTIFICATE OF SERVICE

I, Ivan T. Webber, hereby certify that I served the attached Amici Curiae Brief by depositing two (2) copies thereof in the United States mail on March 28, 2008 addressed to each of the following:

Michael B. O'Meaera
Roger J. Kuhle
Assistant Polk County Attorneys
111 Court Ave., Rm. 340
Des Moines, Iowa 50309

Dennis W. Johnson
Amy M. Bjork
Dorsey and Whitney, LLP
801 Grand Avenue, Suite 3900
Des Moines, Iowa 50309-2790

Ivan T. Webber
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309-2231
Telephone: 515-243-7611
ATTORNEYS FOR PLAINTIFFS-APPELLEES

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

STATEMENT OF INTEREST OF *AMICI*

Amici are organizations dedicated to eliminating all forms of invidious discrimination in our community. Onelowa, the state's largest LGBT advocacy organization, is dedicated to supporting full equality for gay, lesbian, bisexual and transgender individuals living in Iowa through grassroots efforts and education. The Iowa chapters of Parents, Families and Friends of Lesbians and Gays—PFLAG of West Des Moines, North Iowa, Ames, Northeast Iowa and Quad Cities—promote the health and well-being of gay, lesbian, bisexual and transgender persons through support, education and advocacy. The LGBT Community Center of Central Iowa builds community through support groups and services. The Equal Justice Society is a national organization of scholars, advocates and concerned individuals working to ensure that the rights of all are expanded, not diminished, by our courts and policy makers. The National Black Justice Coalition is an African-American civil rights organization dedicated to ending the impact of racism and securing equality for lesbian, gay, bisexual and transgender people. The Mexican American Legal Defense and Educational Fund fosters sound public policies, laws and programs to safeguard the civil rights of the 45 million Latinos living in the United States and to empower the Latino community to participate fully in our society. The Zuna Institute is a national advocacy organization for Black Lesbians that focuses on economic development, education, public policy, and improved health through community organizing, training, and networking. The Asian American Justice Center works to advance the human and civil rights of Asian Americans through advocacy,

public policy, education and litigation. The Southern Poverty Law Center fights all forms of discrimination and works to protect society's most vulnerable members through litigation, education, and monitoring organizations that promote hate. People For the American Way Foundation is a nationwide membership organization working to promote the constitutional values of equal rights, pluralism, and liberty. The Asian American Legal Defense and Education Fund focuses on issues affecting Asian Americans through litigation, advocacy, education, and organizing. The Immigrants' Rights Program of the American Friends Service Committee promotes justice in immigration through a commitment to the principle of nonviolence.

ARGUMENT

The case at bar invites this Court to address two related constitutional questions, both of which are matters of first impression in this State: What analytical approach does the Iowa Constitution call for in determining the degree of judicial scrutiny that applies to laws singling out a disfavored group of citizens; and how should classifications based on sexual orientation be scrutinized? *Amici* submit that, under any approach that this Court might embrace, antigay discrimination merits the most searching form of judicial review.[1]

This Court has identified two distinct modes of analysis that it might utilize when assessing an equal protection claim under the Iowa Constitution. The first

---

[1] *Amici* agree with the holding of the district court that the exclusion of same-sex couples from the institution of civil marriage constitutes a sex-based classification, and also that the exclusion is not justified by any rational or legitimate purpose. If this Court agrees with either of those conclusions, then it will not need to address the analytical question of heightened scrutiny.

mode, which the Court has termed an "independent application," is the governing standard when a principle embodied in the Iowa Constitution is coextensive with a parallel provision in the Federal Constitution. This Court has said that it bears a responsibility to perform an independent analysis of such a provision, even when the Supreme Court has already weighed in, utilizing its own judgment as to how the provision should be interpreted and applied. *Racing Assoc. of Cent. Iowa v. Fitzgerald* [*RACI II*], 675 N.W.2d 1, 6 (Iowa 2004); *Bierkamp v. Rogers*, 293 N.W.2d 577, 579, 579 (Iowa 1980). *See also Ames Rental Prop. Assoc. v. City of Ames*, 736 N.W.2d 255 (2007). The second mode, which the Court has termed an "independent analysis," applies when a principle embodied in the Iowa Constitution is not identical to its federal counterpart, requiring this Court to determine for itself the analytical framework that will govern. *RACI II*, 675 N.W.2d at 5. In both cases, it remains open to this Court to reach a judgment that is unconstrained by federal court precedents. Such precedents "are persuasive, but not binding, on this court in its consideration of claims based on the Iowa Constitution," *RACI II*, 675 N.W.2d at 6—the more so in equality cases, "in view of the ill-defined parameters of the equal protection clause." *Id.* (citation omitted).

Amici need not and do not urge either analytical mode upon this Court. Whether this Court analyzes the status of antigay discrimination under the approach that the Supreme Court of the United States has adopted or instead chooses one of the distinctive frameworks used by other state supreme courts, three principles will lie at the core of the analysis.

First. It is a fundamental precept of our system of government that caste and second-class citizenship have no place in our civil community. This precept is particularly urgent in the case of groups that have been subjected to persistent discrimination over the course of time. Where such a history of discrimination exists, it is strong evidence that prejudice will prevent the disadvantaged group from protecting itself reliably in the ordinary political process, placing the group at risk of oppression if its basic rights are left up to the majority. This first precept embodies a democratic principle: Government should never declare one class of people to be inherently superior or inferior to others. In a government of, for and by the people, all persons should enjoy an equal inherent status before the law.

Second. No individual should be excluded from equal rights, privileges and obligations for reasons that are unrelated to his ability to contribute as a productive member of society. Differences exist among people, and the principle of equal protection has never required absolutely equal treatment of all people in all cases. "Difference" becomes "discrimination," however, when the characteristic that is used to justify unequal treatment is innocuous, bearing no relationship to the ability of the individual to participate in the life of the community. This second precept embodies a principle of fairness: When a group has a defining characteristic that makes its members unpopular with the majority but has no bearing upon their capacities, government should not use that characteristic as a basis for subjecting them to disadvantage. When the discrimination is broad and pervasive, the unfairness is all the more acute.

Third. No person should be coerced to abandon or change a part of her identity that lies at the core of her understanding of self and her relationship to others. This third precept embodies a principle of dignity: When an innocuous characteristic cannot be changed, or when a change would require such physical and psychic disruption that the individual's basic understanding of self would not remain intact, it would offend our shared notions of human dignity to penalize the individual for that characteristic. Either the penalty is gratuitous and therefore cruel, or else it constitutes an attempt to coerce the individual to alter a defining trait that should not be the subject of government regulation.

These three principles—the democratic value that rejects the relegation of historically disfavored minorities to second-class citizenship; the fairness value that rejects broad discrimination on the basis of qualities that are practically and morally innocuous; and the dignitary value that rejects attempts by the state to alter or penalize a defining element of an individual's identity—provide the core justification for a heightened judicial role in scrutinizing discriminatory laws. All three principles strongly indicate that discrimination on the basis of sexual orientation requires heightened judicial scrutiny.

I. Federal and State Constitutions Share a Common Core of Principles

In its first effort to identify the principles that justify heightened judicial scrutiny of a classification, the Supreme Court famously spoke of the political process failure that can result when "discrete and insular minorities" are singled out for abuse. *U.S. v. Carolene Prods.*, 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 784 n.4 (1938). Discrimination warrants "more searching judicial inquiry," the Court

found, when it "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" from systematic disadvantage.

This focus on the political isolation of minorities was an important starting point, but it was just a start. As Justice Powell has written:

> Footnote 4 is a fertile starting place for constitutional theory. Generally, it has been a constructive influence in the development of modern constitutional doctrine. But it is not a developed theory in itself. Nor is there any reason to think that [its author, Justice Harlan Fiske] Stone intended it to be.

Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 Colum. L. Rev. 1087, 1090 (1982). The Court's initial formulation has required updating in light of new social realities and new forms of discrimination. Thus, the Court has required heightened judicial scrutiny for sex-based classifications, even though women are not a minority and, though massively underrepresented in the halls of government, are not insular as a group. *See Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451 (1976) (applying intermediate scrutiny to all sex-based classifications); *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764 (1973) (plurality opinion) (arguing that strict scrutiny is appropriate for sex discrimination).

The Court has not yet explicitly addressed the issue of heightened scrutiny for antigay discrimination. The trend in the Court's jurisprudence, however, has been toward greater recognition of the equal rights of gay people. On the only occasion on which it has decided the merits of an equal protection claim in a case involving antigay discrimination, the Court found that the challenged provision—an amendment to the Colorado Constitution—lacked even a legitimate, rational purpose, obviating any need to reach the question of

heightened scrutiny. *See Romer v. Evans*, 517 U.S. 620, 631–32, 116 S. Ct. 1620, 1626–27 (1996).[2] In its other major pronouncement on the rights of gay people, the Court has ruled that laws criminalizing private non-commercial sexual intimacy between consenting same-sex couples violate the constitutional right of privacy. *See Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003). In so holding, the Court repudiated its earlier ruling in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), in which it had upheld such laws and effectively placed its imprimatur on other discriminatory practices. *See Lawrence*, 539 U.S. at 577, 123 S. Ct. at 2483 ("*Bowers* was not correct when it was decided, and it is not correct today. . . . *Bowers v. Hardwick* should be and now is overruled."); *see also* 539 U.S. at 579–85, 123 S. Ct. at 2484–88 (O'Connor, J., concurring in the judgment) (arguing that the law should have been struck down on an equal protection theory); 539 U.S. at 574–75, 123 S. Ct. at 2481–82 (acknowledging equal protection argument as "tenable"). Thus, if this Court decides to adhere to a federal model of heightened scrutiny analysis, its "independent application" of that standard will allow it to write on a clean slate.[3]

---

[2] *Romer* involved a state constitutional amendment by which Colorado had prohibited its legislature, executive, or courts from offering any protection from discrimination on the basis of "homosexual, lesbian, or bisexual orientation." *Romer*, 517 U.S. at 624; 116 S. Ct. at 1623. The Court found this discrimination to be so broad and undifferentiated as to "confound[the] normal process of judicial review," amounting to "a classification of persons undertaken for its own sake." 517 U.S. at 633, 635; 116 S. Ct. at 1628–29. It therefore found that the provision violated even the most deferential form of review without addressing the question of heightened scrutiny for other forms of antigay discrimination. *See* Case Note, *Principled Silence*, 106 Yale L.J. 247 (1996) (arguing that *Romer* employs an analysis that invites heightened scrutiny in a future case).

[3] On the specific question of equal treatment for gay couples under a State's civil marriage laws, the Supreme Court has issued one summary

If, instead, this Court believes that an "independent analysis" is called for under which it will adopt a framework of its own devising, a number of possibilities present themselves. Oregon offers one model. The Supreme Court of Oregon has held its constitution to call for skepticism toward any classification that discriminates against a true "class of citizens." *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 977 (Ore. 1982). The Oregon Constitution decries special privileges—state laws that use "'classification[s]' by collective human characteristics" to mark off unequal classes, granting special "favor[]" to some in disregard of others. *Id.* at 977–78. In contrast, a law that uses classifications in the course of administering a policy or program but does not create an "inequality of privileges or immunities . . . to any citizen [or] class of citizens" is not a special concern. *State v. Clark*, 630 P.2d 810, 814 (Ore. 1981). The Oregon Constitution attends to the creation of inequality among existing classes of people, rather than statutory distinctions that do not correspond to "true" classes of citizens in the world. To draw a comparison to an Iowa precedent: The Oregon courts might have concluded that the classification under review in the *Racing Association of Central Iowa* litigation (taxation of gambling in general vs. racetrack gambling), even if irrational within the statutory scheme, did not disadvantage any "true"

---

dismissal of an appeal for want of a substantial federal question, some thirty-six years ago. *See Baker v. Nelson*, 409 U.S. 810; 93 S. Ct. 37 (1972). This Court has already held that such summary dismissals are not binding on the courts of Iowa when interpreting their own Constitution—*see Bierkamp*, 293 at 579, 581 (reaffirming the "constitutional obligation" of Iowa courts to interpret the Iowa Constitution independently, even following a summary dismissal by the Supreme Court of the United States for want of a substantial federal question)—and the legal and constitutional status of antigay discrimination has changed since 1972 in ways indicating that the *Baker* dismissal retains little significance.

class of citizens and thus would not have implicated their state constitution. In this respect, Oregon's approach to equal protection is comparatively restrained. Applying that standard, the Court of Appeals of Oregon has ruled that gay people constitute a "true class" of citizens and that discrimination against gay couples in the administration of employment benefits requires strict judicial scrutiny. *Tanner v. Oregon Health Sci. Univ.*, 971 P.3d 435 (Ct. App. Ore. 1998).

The Supreme Court of Alaska has adopted a different approach. In Alaska, equal protection claims are administered under a "sliding scale" analysis that "places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake." *Malabed v. North Slope Bureau*, 70 P.3d 416, 420–21 (Alaska 2003). The most important threshold question in Alaska is "what weight should be afforded the constitutional interest impaired by the challenged enactment." *Alaska Pac. Ins. Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984). *See also id.* ("The nature of this interest is the most important variable in fixing the appropriate level of review."). A law's use of a suspect classification implicates a greater individual interest on the part of the disadvantaged party, on top of the tangible rights and benefits that attach to the law. But even a law that does not employ such a classification and is entitled only to "minimal scrutiny" still requires an active review by the court to determine whether the classification chosen by the state bears a "fair and substantial" relationship to the interests that the state wishes to advance. *Alaska Civil Liberties Union v. Alaska*, 122 P.2d 781, 789–90 (Alaska 2005). The greater the

importance of the individual rights and interests at issue in the case (or the more suspect the classification employed by the state), the greater the burden will be upon the state to demonstrate a close fit between the means it has chosen and the ends that it seeks to achieve. *Alaska Pac. Ins.*, 687 P.2d at 269. Where those individual rights and interests are great, no formal finding of a "suspect class" is necessary to warrant active and searching review. *Alaska Civil Liberties Union*, 122 P.2d at 789–90. Applying that standard, the Supreme Court of Alaska has held that the exclusion of same-sex couples from equal treatment under the employment benefits that the state offers to its married employees is a violation of equal protection, due to the importance of the interests involved and the irrelevance of the characteristic used to deny them. *Id.* at 789–94.

Despite some important differences, these varying approaches to equal protection—using political isolation and disadvantage as the starting point of the inquiry; focusing on the elimination of privileges for true classes of citizens; or employing a sliding scale that emphasizes the individual interests that the classification impairs—all share a common commitment to principles of equal citizenship, fundamental fairness, and human dignity. These shared principles require antigay discrimination to answer to the strictest form of judicial scrutiny.

II. Equal Protection Embodies a Principle of Equal Citizenship

Ensuring the equal status of all citizens before the law is one of the central functions of a Constitution and a judiciary in the modern era—so much so that the principle of "Equal Justice Under Law" is inscribed above the entrance to the building of the Supreme Court of the United States. *See*

http://www.supremecourtus.gov/about/westpediment.pdf. "The Equal Protection Clause," the Supreme Court has written, "was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation." *Plyler v. Doe*, 457 U.S. 202, 213, 102 S. Ct. 2382, 2393 (1982). The Court reaffirmed this proposition in the opening passage of the first decision in which it recognized the imperative for judges to ensure the equal status of gay men and lesbians.

> One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake.

Romer v. Evans, 517 U.S. 620, 623, 116 S. Ct. 1620, 1623 (1996).

This basic constitutional commitment to the elimination of caste and second-class citizenship requires courts to be especially vigilant in cases where the disfavored group has been subjected to a long history of discrimination. Such discrimination is self-reinforcing. The longer a group has been treated unequally, the more natural the inequality seems, and hence the more difficult it is to dislodge the inequality through the ordinary legislative process. When the Supreme Court first found that discrimination on the basis of sex required heightened judicial scrutiny, it identified our Nation's "long and unfortunate history of sex discrimination" as its first and most important consideration. *Frontiero v. Richardson*, 411 U.S. 677, 684, 93 S. Ct. 1764, 1769–70 (1973) (plurality opinion of Brennan, J.). Embracing this passage, a majority of the Court has explained that "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history." *U.S. v. Virginia* [*VMI*], 518 U.S. 515, 531–

32, 116 S. Ct. 2264, 2274–75 (1996). When assessing the constitutional status of discrimination, the first question has always been whether history demonstrates that tenacious and persistent prejudice subjects the group to a continuing danger of exclusionary policies amounting to second-class citizenship.

The long history of pervasive discrimination against gay men and lesbians is not subject to dispute. Judges around the country have found that history to be clear and grave. In an early statement on the issue, Justice William Brennan wrote that "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.'" *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014, 105 S. Ct. 1373, 1377 (1985) (Brennan, J., dissenting from denial of certiorari) (citation omitted). Many courts have come to the same conclusion. The Oregon Court of Appeals explained:

> [W]e have no difficulty concluding that plaintiffs are members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

Tanner, 971 P.2d at 447. *See also Baker v. State*, 744 A.2d 864, 885 (Vt. 1999) (recognizing "the long history of official intolerance of intimate same-sex relationships" and rejecting the argument that historical intolerance can justify present discrimination); *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment) (describing the long history of discrimination against gay men and lesbians and noting that "[d]iscrimination against homosexuals has been pervasive in both the public and private sectors").

Indeed, in the marriage equality case now under review by the California Supreme Court, even the intermediate appellate court that erroneously rejected the claim before it conceded that discrimination against gay men and lesbians "would seem to . . . readily [satisfy]" the requirement of unequal treatment that is "associated with a 'stigma of inferiority and second-class citizenship,' manifested by a group's history of legal and social disabilities." *In re Marriage Cases*, 143 Cal. App. 4th 873, 922 (1st App. Dist. 2006), *appeal pending*.

It is worth describing the nature of the historical discrimination that these courts have so readily recognized. Gay men and lesbians have been subjected to legal and social oppression in every area of human endeavor for much of the time that they have been recognized as a distinct class.

During what is perhaps the worst systematic violation of human rights in recorded history—the machinery of death implemented by the Nazi Party of Germany during the 1930s and 40s—gay men and lesbians were among the groups that were identified with a special symbol (the pink triangle), rounded up from their homes, and sent away to death camps. *See* Richard Plant, *The Pink Triangle: The Nazi War Against Homosexuals* (1986); Heinz Heger, *The Men with the Pink Triangle: The True, Life-and-Death Story of Homosexual in the Nazi Death Camps* (1980). During the same era, while America was fighting the Nazis, our own military implemented an official policy of discrimination against gay servicemembers. *See* Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (1990); Randy Shilts, *Conduct Unbecoming: Gays and Lesbians in the U.S. Military* (1994).

Gay men and lesbians have been fired from government employment, excluded from the family law system altogether, treated as outcasts in our educational institutions, and branded as presumptive felons through the operation of "sodomy" laws that criminalized same-sex intimacy. *See* George Chauncey, *Why Marriage: The History Shaping Today's Debate Over Gay Equality* 5–22 (2004) (recounting the history of antigay discrimination in America); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 NYU L. Rev. 1327, 1338–62 (2000) (same). These attitudes have also found ample expression in popular culture, as the history of American film attests. Until recently, gay men and lesbians were depicted almost exclusively as figures to be mocked, feared, or persecuted in the American cinematic tradition. *See* Vito Russo, *The Celluloid Closet: Homosexuality in the Movies* (Rev. Ed. 1987).

Today, gay men and lesbians remain second-class citizens under federal law and the laws of the vast majority of states in this Nation. They are prohibited from serving openly in the U.S. military and hundreds are subjected to discriminatory discharge each year. *See* 10 U.S.C. § 654 ("Policy Concerning Homosexuality in the Armed Forces"); Servicemembers Legal Defense Network, *Conduct Unbecoming: The 10th Annual Report on "Don't Ask, Don't Tell"*, at http://www.sldn.org/templates/dadt/record.html?section=22&record=1411 (reporting discharge practices under "Don't Ask, Don't Tell"). Their relationships are categorically excluded from any recognition by the federal government. *See* 1 U.S.C. § 7. In immigration, in the tax code, in retirement and ERISA, in the

Family and Medical Leave Act, and in myriad other regions of federal law, gay men and lesbians are met with the same response: "No Homosexuals Need Apply." There is no federal statute that protects gay men and lesbians from any form of discrimination—in the workplace, housing, public accommodations, or anywhere else—and there never has been. In Iowa, the recent expansion of antidiscrimination and anti-bullying laws has put the state further along the path toward equality. But the inequalities that remain in Iowa are part of a tenacious reality of second-class citizenship that all gay people face in the United States. That second-class citizenship is anathema to the democratic principle of equality that this Court should find the Iowa Constitution to embrace.

III. Equal Protection Embodies a Principle of Fundamental Fairness

Equal protection also embodies a principle of fairness that rejects the use of innocuous characteristics as a basis for denying full citizenship. As courts have held in many contexts, a characteristic that "bears no relation to ability to perform or contribute to society" is an improper and constitutionally suspect basis for classification. *Frontiero*, 411 U.S. at 686–87, 93 S. Ct. at 1770 (plurality opinion); *see also Trimble v. Gordon*, 430 U.S. 762, 769–70, 97 S. Ct. 1459, 1464–65 (1977) (holding classifications based on parentage to be constitutionally suspect); *Mathews v. Lucas*, 427 U.S. 495, 505, 96 S. Ct. 2755, 2762 (1976) (illegitimacy bears "no relation to the individual's ability to participate in and contribute to society"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985) (strict scrutiny applies when a characteristic is "so seldom relevant to the achievement of any legitimate state interest that laws

grounded in such considerations are deemed to reflect prejudice and antipathy"). It is now well established that "[s]exual orientation plainly has no relevance to a person's ability to perform or contribute to society." *Watkins*, 875 F.2d at 725 (Norris, J., concurring in the judgment) (citation omitted). As the district court found: "Sexual orientation is a trait unrelated to ability. It bears no relation to a person's ability to perform, to contribute to, or to participate in society, and . . . implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Dist. Ct. Op., p.29, ¶ 62.

Even in the arena where antigay arguments often find the most traction—cases involving parenting and child rearing—the courts of Iowa have long since recognized that an individual's sexual orientation, by itself, is irrelevant to his or her fitness to be a parent. In 1990, this Court reversed a visitation restriction that had been placed upon a gay man, prohibiting him from spending time with his two children when an "unrelated adult" was present. *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990). The restriction "was obviously imposed on account of [the father's] homosexual lifestyle," and this Court found "no reason" to permit such a penalty where the record showed that the father was a "good, loving, responsible" parent. *Id.* The Court of Appeals of Iowa followed suit, deciding a series of custody disputes involving gay parents in which it found sexual orientation to be insignificant when compared to factors that actually bore upon their fitness. *See Hodson v. Moore*, 464 N.W.2d 699, 700–01 (Ct. App. Iowa 1991) ("[N]o testimony was entered about any harm to [the child] as a direct result of [the mother's] homosexuality per se. Any potential harm appears to

relate to [her girlfriend's] alcoholism and apparent immaturity rather than her sexuality."); *In re Marriage of Wiarda*, 505 N.W.2d 506, 508 (Ct. App. Iowa 1992) (treating mother's lesbianism as irrelevant in custody dispute and explaining that the presence of the mother's new partner "would likely . . . contribute[] to the continued breakdown of the relationship between [the ex-spouses] . . . whether [the mother's] friend were a man or a woman."). By 1995, this principle had become so well established that the Court of Appeals could confidently characterize a parent's "sexual orientation as a nonissue" in custody disputes. *In re Marriage of Cupples*, 531 N.W.2d 656, 657 (Ct. App. Iowa 1995). Thus, in this often contested area, Iowa courts have already concluded that sexual orientation has no practical impact on an individual's worth or abilities.

There has also been a strong moral dimension to the debate over the legal status of gay people in America. For some, discrimination against gay people springs from a belief that sexual orientation has inherent moral significance, with heterosexuality as the preferred status. Under this view, the sexual orientation of a couple is relevant to our civil marriage laws because the benefits of civil marriage are symbolic as well as tangible and the imprimatur that the institution confers should be reserved for those who enjoy the preferred moral status. As recent decisions of the Supreme Court make clear, however, the bare assertion that heterosexuality and straight relationships are morally preferable to homosexuality and gay relationships has no place in our constitutional tradition.

The current debate is not the first occasion that courts and legislatures have relied upon arguments about inherent moral worth in order to justify

differential treatment. In *Bradwell v. Illinois*, 83 U.S. 130 (1872), the Supreme Court upheld a state prohibition on the practice of law by women. Writing for himself and two others, Justice Bradley issued an infamous assessment of the unfitness of women to be attorneys, based upon both their inferior natural capacities and the moral imperative that they be excluded from professional life.

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things . . . .

Id. at 141–42 (Bradley, J., concurring). *See also Goesaert v. Cleary*, 335 U.S. 464, 466, 69 S. Ct. 198, 199–200 (1948) (upholding Michigan law that forbade women from being bartenders unless attended by a male parent or spouse and affirming the state's ability to combat the "moral and social problems" that would arise from an unsupervised woman working in such a setting). This treatment of women as morally inferior participants in public life bore disturbing echoes of the Court's darkest moment, the decision of *Dred Scott v. Sanford*, 60 U.S. 393 (1854), in which the Court pronounced Black people to be mentally and morally inferior to their White counterparts and ineligible for treatment as citizens. *See id.* at 404–07 (holding that the Constitution views Black people as "a subordinate and inferior class of beings who had been subjugated by the dominant race" and whose inferiority "was regarded as an axiom in morals as well as in politics which no one thought of disputing or supposed to be open to dispute").

The Supreme Court briefly continued this sad judicial legacy when it relied upon moral disapproval as a justification for the differential treatment of gay men and lesbians in the short-lived decision of *Bowers v. Hardwick*. Upholding the threatened prosecution of a gay man for private sexual intimacy with another consenting adult, the Court proclaimed that proscriptions against "sodomy" have "ancient roots" and held that the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" constituted a sufficient basis for criminalizing the sexual intimacy of gay people—and, effectively, the people themselves. *Bowers*, 478 U.S. at 192, 196, 106 S. Ct. at 2844, 2846. When the Court repudiated *Bowers* seventeen years later in *Lawrence v. Texas*, it did more than overrule the result in that case. Reaffirming its decision in *Romer*, the Court rejected the idea that moral disapproval of homosexuality could serve to justify differential treatment in our constitutional tradition, whether in privacy or equality analysis. *See Lawrence*, 539 U.S. at 571, 123 S. Ct. at 2480 (holding that majority may not "use the power of the State to enforce . . . on the whole society" a set of "ethical and moral principles" that reject homosexuality); 539 U.S. at 582, 123 S. Ct. at 2486 (O'Connor, J., concurring in the judgment) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); 539 U.S. at 574–75, 123 S. Ct. at 2481–82 (approving this view as a "tenable" basis for deciding the case); *Romer*, 517 U.S. at 632, 634, 116 S. Ct. at 1627–28 ("animus" and a "bare desire to harm a politically unpopular group" cannot justify differential treatment of gay people).

This extirpation of moral disapproval as a constitutional justification for laws that exclude gay people from equal citizenship further confirms that antigay discrimination has joined discrimination against women and people of color as constitutionally suspect. Discrimination on the basis of a characteristic that is both practically and morally innocuous violates the principle of fundamental fairness that should underlie the promise of equality in any Constitution.

IV. Equal Protection Embodies a Principle of Human Dignity

Finally, equal protection embodies a basic principle of human dignity. When a State denies important rights and benefits to a class of citizens based upon some defining characteristic, it effectively pressures those citizens to change the characteristic that serves to disqualify them. In some cases, such pressure is permissible. A state can tax long-time homeowners more favorably than recent purchasers in order to dissuade turnover and encourage stability in neighborhoods. *See Nordlinger v. Hahn*, 505 U.S. 1, 12, 112 S. Ct. 2326, 2332–33 (1992) (upholding differential property tax scheme). A city can pass zoning laws that encourage unrelated people to choose living arrangements that will "promot[e] and preserv[e] neighborhoods that are conducive to families." *Ames Rental Prop.*, 736 N.W.2d at 260 (upholding municipal ordinance scheme under independent application of federal standard); *id.* at 264–65 (Wiggins, J., dissenting) (acknowledging that Ames had a "legitimate purpose" but finding the ordinance not "rationally related" to promoting that purpose). In such cases, government may encourage citizens to change their status or circumstances.

But equal protection doctrine lifts some characteristics out of this economy of governmental incentives. When a trait forms a core component of an individual's identity, such that making a change would either be impossible or would entail great psychic or physical disruption, attempts by government to pressure or coerce citizens to change that trait violate the dignity of the individual. The Louisiana Constitution gives explicit voice to this principle, titling its equal protection provision, "Right to Individual Dignity." LA Const. art. I § 3.

Courts have sometimes discussed this dignitary principle under the rubric of "immutability"—a term that implies that a trait must be wholly incapable of alteration for strict judicial scrutiny to be warranted. *See, e.g.*, *Hewitt*, 653 P.2d at 977 ("Like other state and federal courts, we agree that a classification is "suspect" when it focuses on "immutable" personal characteristics."); *Frontiero*, 411 U.S. at 686, 93 S. Ct. at 1770 (classifications are suspect when based upon "an immutable characteristic determined solely by the accident of birth"). But "[t]he Supreme Court has never held that only classes with immutable traits can be deemed suspect" under the U.S. Constitution. *Watkins*, 875 F.2d 725–26 (Norris, J., concurring in the judgment). *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 1294 (1973) (describing the elements of a suspect classification without reference to immutability). Discrimination on the basis of alienage provokes heightened judicial review, for example, despite the ready capacity to change citizenship status. *See Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority for whom . . . heightened

judicial solicitude is appropriate.") (citation omitted). Rather, when the Court has discussed "immutability," the inquiry has served to identify traits that the State should not use to penalize individuals because of the affront to human dignity that it would commit by pressuring or coercing individuals into making a change. "'[I]mmutability'" Judge Norris wrote, "may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically." *Watkins*, 875 F.2d at 726 (Norris, J., concurring in the judgment).

Under Iowa law, this more refined understanding of "immutability" finds expression through the example of gender. The Iowa legislature has formally acknowledged that the characteristic of gender is sometimes subject to change and variation. Iowa law provides that an individual may obtain a new birth certificate indicating a change in gender by submitting "[a] notarized affidavit by a licensed physician and surgeon or osteopathic physician and surgeon stating that by reason of surgery or other treatment by the licensee, the sex designation of the person has been changed." Iowa Code § 144.23(3) (2008). This acknowledgement of the potential mutability of gender does not render sex-based classifications any less suspect. Rather, Iowa has declared that discrimination on the basis of gender—including gender identity and transgender status—is impermissible, *see* Iowa Code § 216 (2008), and Iowa courts continue to treat sex-based classifications as suspect, meriting heightened judicial scrutiny, *see State v. Sanchez*, 692 N.W.2d 812 (Iowa 2005). *See also Tanner*, 971 P.2d at 446 (noting that "[b]oth alienage and religious affiliation may be

changed almost at will [and], given modern medical technology, so also may gender," but such classifications are still treated as suspect). The potential mutability of gender does not give the State a free hand in penalizing or coercing people's choices in that arena. Gender is a core, defining trait, and it would violate basic principles of human dignity for the State to use that characteristic as a condition for access to important rights and obligations.

So it is with sexual orientation. Most people experience their sexual orientation as a core element of their identity that is not subject to change. Gay people do not view their sexual identities as a "choice" any more than straight people do. As Judge Norris has succinctly observed: "Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation." *Watkins*, 875 F.2d at 726 (Norris, J., concurring in the judgment). But the mutability or immutability of sexual orientation is not the reason why antigay discrimination is constitutionally suspect. The reason, rather, is that sexual identity is not a matter that the State has any business in pressuring or coercing individuals to alter through regulation and penalty. As the district court in this case recognized after its review of the evidence:

> Sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment and intimacy. One's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of human identity and life. . . . Interventions aimed at changing an individual's sexual orientation have not been demonstrated by empirical research to be effective or safe. They are considered ethically suspect, and have generated cautionary statements from virtually all of the major mental health professional associations because such interventions

> can be and have been harmful to the psychological well-being of those who attempt them.

Dist. Ct. Op., pp. 27–28, ¶¶ 56 & 60.

The indignity associated with antigay discrimination is particularly evident in the family law context. Excluding gay couples from civil marriage does not cause those couples to cease to exist. It simply imposes harm upon them, their children, and their communities. Either that harm is meant as a gratuitous punishment, or else it proceeds from a vestigial belief that gay couples can be pressured into changing the "universe of persons with whom [they are] likely to find the satisfying and fulfilling relationships that . . . comprise an essential component of human identity and life." Dist. Ct. Op., p.27, ¶ 56. As courts have recognized in rejecting the related phenomenon of gender discrimination, such a belief is based upon "gross, stereotyped" attitudes and "outmoded notions" that no longer have a place in our constitutional traditions. *Frontiero*, 411 U.S. at 684, 93 S. Ct. at 1769; *Cleburne*, 473 U.S. at 441, 105 S. Ct. at 3255.

CONCLUSION

To conclude that antigay discrimination is suspect and requires close judicial scrutiny, this Court need not pretend that there are no differences between gay people or gay relationships and their straight counterparts. As the Supreme Court has written in explaining its rejection of most sex-based classifications, there remain differences between the sexes, and the "'[i]nherent differences' between men and women . . . remain cause for celebration, . . . not for denigration of the members of either sex or for artificial constraints on an

individual's opportunity." *VMI*, 518 U.S. at 533, 116 S. Ct. at 2276. So it is with sexual orientation. Just as we celebrate the differences between the genders, so we can recognize and celebrate the different experiences that same-sex and opposite-sex relationships contribute to the complex tapestry of our community. It is time to put behind us the condemnation that has transformed "difference" into "discrimination" and excluded gay men and lesbians from the principles of equal citizenship, fairness and dignity that are their shared birthright. We ask this Court to hold that discrimination against gay men and lesbians has no place in the Iowa Constitution and requires the strictest form of judicial scrutiny.

Respectfully submitted,

Ivan T. Webber (AT0008315)
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309-2231
Telephone: 515/243-7611
Facsimile: 515/243-2149
E-mail: iwebber@ahlerslaw.com

Tobias Barrington Wolff*
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104
Telephone: 215/898-7471
Facsimile: 215/573-2025
E-mail: tobiaswolff@mindspring.com

ATTORNEYS FOR Onelowa; the Iowa chapters of Parents, Families and Friends of Lesbians and Gays; the Equal Justice Society; the National Black Justice Coalition; the Mexican American Legal Defense and Educational Fund; the Zuna Institute; the Asian American Justice Center; the Southern Poverty Law Center; People For the American Way Foundation; the Asian American Legal Defense and Education Fund; and the Immigrants' Rights Program of the American Friends Service Committee.

* Application for *pro hac vice* admission submitted.

ATTORNEY'S COST CERTIFICATE

I, Ivan T. Webber, hereby certify that the actual cost paid for printing the foregoing Brief of Amici Curiae was the sum of $ 125.40 .

Ivan T. Webber
ATTORNEY FOR PLAINTIFFS-APPELLEES