
IN THE
Court of Appeals of Maryland

FRANK CONAWAY, *et al.*,
Appellants,

v.

GINTANJALI DEANE & LISA POLYAK, *et al.*,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY, PART 30
CASE No. 24-C-04-005390 (M. BROOKE MURDOCK, JUDGE)

**BRIEF AMICI CURIAE OF EQUALITY MARYLAND, INC.; FAMILIES WITH PRIDE;
GAY FATHERS COALITION; GAY, LESBIAN, BISEXUAL, AND TRANSGENDER
COMMUNITY CENTER OF BALTIMORE AND CENTRAL MARYLAND;
MARYLAND LESBIAN & GAY LAW ASSOCIATION; PFLAG BALTIMORE; PFLAG
COLUMBIA/HOWARD COUNTY; GAY & LESBIAN ADVOCATES & DEFENDERS;
HUMAN RIGHTS CAMPAIGN; HUMAN RIGHTS CAMPAIGN FOUNDATION;
NATIONAL BLACK JUSTICE COALITION; AND NATIONAL CENTER FOR
LESBIAN RIGHTS IN SUPPORT OF APPELLEES**

STUART F. DELERY
NORA FREEMAN ENGSTROM
Counsel of Record
BENJAMIN C. MIZER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1876 Pennsylvania Avenue NW
Washington, D.C. 20006
(202) 663-6000

Counsel for Amici

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. MARYLAND’S EQUAL PROTECTION PRINCIPLE IS INDEPENDENT OF—AND MORE PROTECTIVE THAN—ITS FEDERAL COUNTERPART	7
II. GAY MEN AND LESBIANS HAVE SUFFERED A PERSISTENT HISTORY OF INVIDIOUS DISCRIMINATION BOTH IN THE UNITED STATES AND IN THE STATE OF MARYLAND	8
A. Gay Men And Lesbians Have Suffered Discrimination In The United States In Every Sphere Of Life	10
1. Private Lives and Personal Relationships	11
2. Family Life.....	12
3. Employment.....	14
4. “Psychotic Personality”	18
5. Victims of Hate Crime; Objects of Ridicule.....	21
B. Gay Men And Lesbians In Maryland Have Long Been Subjected To Invidious Discrimination, And This Discrimination Continues To The Present Day	24
1. Private Lives and Personal Relationships	25
2. Family Lives	27
3. Employment.....	28
4. Targets for Hate Crimes and Bias Incidents	30

III.	SEXUAL ORIENTATION IS UNRELATED TO ONE’S ABILITY TO PERFORM IN OR CONTRIBUTE TO SOCIETY	32
A.	Contrary To The Myths That Have Triggered Anti-Gay Legislation and Fueled Anti-Gay Discrimination, Gay Men And Lesbians Are Not Mentally Ill, And They Do Not Pose A Threat To Children	33
B.	Gay Men And Lesbians Are Loving, Nurturing Parents, And They Desire Stable, Committed Relationships	36
IV.	SEXUAL ORIENTATION IS AN IMMUTABLE CHARACTERISTIC	40
V.	GAY MEN AND LESBIANS LACK THE POLITICAL POWER NECESSARY TO OBTAIN REDRESS FROM THE POLITICAL SYSTEM.....	43
	CONCLUSION.....	47
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

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	Page(s)
<i>Able v. United States</i> , 155 F.3d 628 (2d Cir. 1998).....	17
<i>Able v. United States</i> , 968 F. Supp. 850 (E.D.N.Y. 1997), <i>rev'd</i> , 155 F.3d 628 (2d Cir. 1998).....	9
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Amici curiae respectfully submit this brief to demonstrate that gay men and lesbians constitute a suspect class, so that classifications on the basis of sexual orientation, such as Maryland Code Ann., Family Law § 2-201, must be reviewed using heightened judicial scrutiny under the Maryland Constitution.

INTEREST OF AMICI CURIAE

Equality Maryland, Inc. (formerly Free State Justice), founded in 1990, is Maryland's largest lesbian, gay, bisexual and transgender civil rights organization, with thousands of members across the state. Equality Maryland's mission is to secure and protect the rights of all lesbian, gay, bisexual, and transgender Marylanders and their families.

Families with Pride (FWP) is a Maryland-based support group for hundreds of lesbian, gay, bisexual, and transgender parents and their children. Its primary purpose is to provide safe, supervised social activities for their children and an opportunity for gay and lesbian parents to meet and discuss issues associated with raising a family. FWP also offers educational forums and workshops on the medical, legal, and social aspects of lesbian and gay parenting. Finally, FWP provides support through political action, outreach, and education to the larger community. It has been in existence since 1990.

Gay Fathers Coalition, Baltimore (GFC) was founded in 1995 to assist gay men who have or who are contemplating having children in understanding the issues surrounding being a gay parent in our society. GFC provides a support and communications network for gay fathers; encourages cooperative action in promoting the common interests of gay fathers and their families; provides opportunities for social interaction among gay fathers, their children, and friends; promotes and sponsors activities that present a positive image of gay fathers; and encourages acceptance of alternative parenting within the community. GFC currently has a

membership of more than sixty gay parents, their partners, and family members from all over Maryland.

The Gay, Lesbian, Bisexual, and Transgender Community Center of Baltimore and Central Maryland (GLCCB) was established in 1977 and remains one of Maryland's oldest gay, lesbian, bisexual, and transgender (GLBT) organizations. The mission of the GLCCB is to achieve equality, understanding, and respect for the GLBT community; to unify gay, lesbian, bisexual, and transgender persons; and to provide quality support services, safe and appropriate facilities, and professional resources for the development of individuals and groups of the GLBT community of Baltimore and Central Maryland. Marriage equality is consistent with the mission of the GLCCB and is of great importance to its constituency and all GLBT communities in Maryland.

The Maryland Lesbian & Gay Law Association is an independent professional, non-profit bar association dedicated to serving the lesbian, gay, bisexual and transgendered community in and around the State of Maryland. Made up of more than 125 attorneys, its members practice in both the private and public sector. The Maryland Lesbian & Gay Law Association seeks to advance the protection of individuals against discrimination based on sexual orientation and gender identification. It believes that the right of individuals to marriage is a basic right that must be afforded to all, including same-sex couples.

PFLAG Baltimore and PFLAG Columbia/Howard County are local affiliates of Parents, Families, and Friends of Lesbians and Gays, Inc. ("PFLAG"), a national, non-profit family organization with a grassroots network of over 500,000 members and supporters, and more than 500 affiliates in the United States. PFLAG and its chapters promote the health and well-being of gay, lesbian, bisexual and transgendered persons, and their families and friends, through support,

education, and advocacy to end discrimination. PFLAG acts to create a society that is healthy and respectful of human diversity, and to assist young people in achieving their full potential.

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading legal rights organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. In addition to GLAD's litigation on workplace discrimination, parenting issues, access to health care, public accommodations and services, and myriad other issues in law, GLAD has challenged discrimination in marriage in several states. Most notably, these cases include GLAD's litigation as counsel in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), in *Baker v. State*, 744 A.2d 864 (Vt. 1999), and currently in *Kerrigan v. Department of Public Health*, Conn. Super. No. NNH-CV 04-4001813. GLAD has also appeared as an *amicus curiae* in other marriage-related litigation.

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where gay, lesbian, bisexual, and transgender people are ensured of their basic equal rights and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits, and responsibilities. HRC has over 600,000 members, including nearly 19,000 in Maryland, all committed to making this vision of equality a reality.

Human Rights Campaign Foundation (The Foundation) is an affiliated organization of the Human Rights Campaign. The Foundation's cutting-edge programs develop innovative educational resources on the many issues facing lesbian, gay, bisexual, and transgender individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity or expression. The Foundation's Family Project is the most comprehensive and up-to-

date resource for and about lesbian, gay, bisexual, and transgender families. It provides legal and policy information about family law, including marriage and relationship recognition, as well as public education in those areas.

The National Black Justice Coalition (NBJC) is a not-for-profit organization based in Washington, D.C., with offices in Maryland. NBJC is a civil rights organization dedicated to empowering black lesbian, gay, bisexual, and transgender people. NBJC works for social justice, equality, and an end to racism and homophobia. NBJC has more than 6,000 members nationwide and advocates for social justice by educating and mobilizing opinion leaders, including elected officials, clergy, and media, with a focus on black communities. NBJC envisions a world where all people are fully empowered to participate safely, openly, and honestly in family, faith, and community, regardless of race, gender identity, or sexual orientation.

The National Center for Lesbian Rights (NCLR) is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbians and gay men and their families through litigation, public policy advocacy, free legal advice and counseling, and public education. Since its founding in 1977, NCLR has played a leading role in protecting and securing fair and equal treatment of lesbian and gay parents and their children. NCLR has served as counsel or *amicus* in numerous cases involving same-sex couples and their children in Maryland and other states, including, for example, *Gestl v. Frederick*, 133 Md. App. 216 (2000) and *North v. North*, 102 Md. App. 1 (1994).

SUMMARY OF ARGUMENT

In Maryland, legislative classifications are generally upheld so long as there is a “rational relationship” between the disparity of treatment and “a legitimate governmental interest.”

Wheeler v. State, 281 Md. 593, 601 (1977); see *Murphy v. Edmonds*, 325 Md. 342, 355 (1990).

“[W]hen a statute creates a distinction based upon clearly ‘suspect’ criteria,” however, “then the legislative product must withstand a rigorous ‘strict scrutiny.’” *Attorney General of Maryland v. Waldron*, 289 Md. 683, 705-706 (1981); see *Murphy*, 325 Md. at 356.

Two key elements can trigger such heightened scrutiny under the Maryland Constitution. A class of people constitutes a suspect class if, as a category, they have “experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” *Waldron*, 289 Md. at 705 (internal quotation omitted). Classifications based on sexual orientation satisfy both criteria.

First, gay and lesbian individuals have experienced a long history of intentional, deep-seated discrimination that continues to the present day, both nationally and in the State of Maryland. This systematic, and in many cases government-sponsored, discrimination has affected, and therefore diminished, every sphere of life—from private lives and personal relationships, to the ability to have or rear children, to the ability to earn a living in the profession of one’s choice. Historically, same-sex orientation was equated with psychosis and therefore exposed a person to the indignity of mental examination and the horror of indefinite civil commitment. Today, same-sex orientation all too often exposes a person to mental harassment and physical violence. The discrimination faced by gay men and lesbians is in relevant ways similar in its perniciousness and intensity to the historic discrimination faced by other groups already treated as suspect classes for equal protection analysis.

Second, this discrimination and disparate treatment have stemmed not from rational distinctions based on material differences or disabilities but from outmoded stereotyping, animus, and prejudice. Notwithstanding the negative effects of societal animus towards gay men and lesbians, sexual orientation, in and of itself, has no bearing on a person's judgment, stability, or reliability, and it is wholly unrelated to a person's ability to perform in or contribute to society. Although some maintain that there are real, cognizable differences between gay or lesbian and heterosexual people that justify discrimination against the former group, those purported "differences" are grounded in nothing more than animus-laced myths.

Two other considerations—the immutability of the trait and the political powerlessness of the group holding that trait—are not essential for recognition of a suspect class under federal jurisprudence and have *never* been deemed prerequisites under state jurisprudence by this Court. Nevertheless, to the extent they are present, these factors can only confirm the need for heightened scrutiny by highlighting the invidiousness of a classification.^{1/} To the extent this Court deems it relevant, sexual orientation is also "immutable"—in that it is not chosen and is not readily changed—and gay persons also face discrimination and other obstacles in the political process that have limited their political power relative to other groups.

Because gay men and lesbians satisfy the established criteria governing the recognition of a suspect class, laws that classify persons on the basis of their sexual orientation—such as Maryland Code Ann., Family Law § 2-201—must be subjected to heightened scrutiny.

^{1/} The Supreme Court of the United States has considered these two factors in some cases in determining whether or not a category of individuals constitutes a suspect class under the Equal Protection Clause of the Fourteenth Amendment. This Court has never held that either factor need be considered under Article 24 of the Maryland Declaration of Rights.

ARGUMENT

I. MARYLAND'S EQUAL PROTECTION PRINCIPLE IS INDEPENDENT OF—AND MORE PROTECTIVE THAN—ITS FEDERAL COUNTERPART.

Classifications on the basis of sexual orientation must be reviewed under heightened scrutiny in order to satisfy Article 24's equal protection guarantee.

It is well settled that Article 24 of the Declaration of Rights embodies the concept of equal treatment under the law. *Murphy v. Edmonds*, 325 Md. 342, 353 (1990); *Attorney General of Maryland v. Waldron*, 289 Md. 683, 704 (1981). Because the equal protection component of Article 24 is in some ways modeled on the Fourteenth Amendment of the United States Constitution, this Court has said that “decisions of the Supreme Court interpreting the Equal Protection Clause of the federal constitution are persuasive” in construing Article 24. *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 640 (1983). Article 24 and the Fourteenth Amendment are not identical, however, and the two clauses have not been identically construed. Although the Equal Protection Clause and Article 24 are “complementary,” each is “independent,” *Verzi v. Baltimore County*, 333 Md. 411, 417 (1994), and Maryland’s “equal protection principle is possessed of “independent animation,” *Waldron*, 289 Md. at 714. As a result, a discriminatory classification may constitute an unconstitutional breach of the equal protection doctrine under the authority of Article 24 even if it does not violate the Fourteenth Amendment as currently interpreted by the federal courts. *Id.* at 715.

It is, in fact, *important* that the Maryland Constitution not be unduly tethered to its federal counterpart. As the Massachusetts Supreme Judicial Court observed in *Goodridge v. Department of Public Health*: “Fundamental to the vigor of our Federal system of government is that ‘state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.’” 798

N.E.2d 941, 959 (Mass. 2003) (quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995)). Thus, although the United States Supreme Court has not yet clearly held that classifications on the basis of sexual orientation are entitled to heightened scrutiny,^{2/} Maryland is perfectly free to hold that distinctions based on sexual orientation are inherently suspect. *See, e.g., Tanner v. Oregon Health Sci. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998).

II. GAY MEN AND LESBIANS HAVE SUFFERED A PERSISTENT HISTORY OF INVIDIOUS DISCRIMINATION BOTH IN THE UNITED STATES AND IN THE STATE OF MARYLAND.

Whether a group has been subjected to a history of purposeful discrimination is one of two key factors in determining whether laws that disadvantage members of that group should be reviewed using heightened scrutiny. *See Waldron*, 289 Md. at 705. *Compare United States v. Virginia*, 518 U.S. 515, 531 (1996) (explaining that the Court's "skeptical scrutiny of official

^{2/} The level of scrutiny applicable to sexual-orientation classifications is an open question under federal law. In the two recent cases presenting equal protection challenges by gay men and lesbians, the United States Supreme Court struck down the classifications without explicitly holding that heightened scrutiny applies to laws that discriminate on the basis of sexual orientation. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). In *Lawrence*, however, Justice O'Connor explained that "a more searching form" of equal protection review applies to laws that exhibit "a desire to harm a politically unpopular group" and that "inhibit[] personal relationships." 539 U.S. at 580 (O'Connor, J., concurring). Some courts of appeals have held that laws disadvantaging gay men and lesbians are not entitled to heightened scrutiny. Those opinions, however, rest largely on *Bowers v. Hardwick*, 478 U.S. 186 (1986). Not only did *Bowers* not address equal protection, *id.* at 190, 196 n.8, but the opinion has been overruled because it "was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. Decisions relying on *Bowers* should therefore not influence the decision of this Court. *See, e.g., Lofton v. Secretary of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (citing *Bowers*' progeny to support finding that sexual orientation does not constitute a suspect classification); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 266-67 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996) (holding that under *Bowers* and its progeny, gay men and lesbians do not constitute a suspect class because the conduct that defines the group can be constitutionally criminalized); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (citing *Bowers* and holding that gay men and lesbians do not constitute a suspect class because it was then established that homosexual conduct could be constitutionally proscribed).

action denying rights or opportunities based on sex responds” to the Nation’s “long and unfortunate history of sex discrimination” (quotation omitted), *with Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (concluding that age-based classifications do not warrant heightened scrutiny because the elderly “have not experienced a history of purposeful unequal treatment” (quotation omitted)).

It is therefore significant that every court to address this issue has concluded that gay men and lesbians have been subject to a history of discrimination. *See, e.g., Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1181 n.23 (9th Cir. 2006) (describing the history of discrimination against gay men and lesbians as a “self-evident fact”); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (observing that “homosexuals have suffered a history of discrimination”); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) (“Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree.”); *Able v. United States*, 968 F. Supp. 850, 854 (E.D.N.Y. 1997), *rev’d*, 155 F.3d 628 (2d Cir. 1998) (“gay men and lesbians have endured a long history of discrimination, both official and private”); *Dahl v. Secretary of United States Navy*, 830 F. Supp. 1319, 1324 n.7 (E.D. Cal. 1993) (“It is undisputed that homosexuals have historically been discriminated against”); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (1987), *rev’d in part and vacated in part*, 895 F.2d 563 (9th Cir. 1990) (“Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society.”); *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (“There is no dispute that gay and lesbian persons have been discriminated against in the past.”); *Tanner*, 971 P.2d at 447 (“[C]ertainly 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.”); *People v. Garcia*, 92 Cal. Rptr. 2d 339, 344

(Cal. Ct. App. 2000) (recognizing that gay men and lesbians “share a history of persecution comparable to that of Blacks and women”); *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987) (en banc) (“This country has a long and unfortunate history of discrimination based on sexual orientation.” (quotation marks omitted)); *Evans v. Romer*, 1993 WL 518586, at *11 (Colo. Dist. Ct. 1993), *aff’d*, 882 P.2d 1335 (Colo. 1994), *aff’d*, 517 U.S. 620 (1996) (concluding that “there is a history of discrimination against homosexuals”). The history of discrimination against gay persons is well-documented, and it is overwhelming.

A. Gay Men And Lesbians Have Suffered Discrimination In The United States In Every Sphere Of Life.

Over the past one hundred years—and particularly in the latter half of the twentieth century—gay men and lesbians have been subjected to discrimination in all areas of their lives. *See generally* George Chauncey, *Why Marriage: The History Shaping Today's Debate Over Gay Equality* 14-20 (2004) (“Chauncey, *Why Marriage*”) Gay men and lesbians have faced prosecution for socializing with their peers and engaging in intimate acts with loved ones. They have been denied the ability to marry the person of their choice and been barred from adopting and raising children. They have been fired from their jobs, denied employment, and disallowed from defending their country. They have also been officially labeled as mentally disordered and deviant. As a result of these labels, they have been subjected to indefinite confinement, incarceration, and involuntary “treatments” in search of a “cure,” as well as officially excluded from immigrating to the United States. Finally, gay men and lesbians have—and continue to be—subjected to extreme violence and ridicule.

1. Private Lives and Personal Relationships

The private lives of gay men and lesbians have long been targeted, and their intimate relations have been criminalized.

Until very recently, broadly drafted laws in many states imposed limits (backed up by criminal penalties) on the intimate associations of gay men and lesbians. For example, in 1923, the New York State legislature specified that one man's "frequent[ing] or loiter[ing] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" was a form of disorderly conduct. George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* at 172-173 (1994) (alterations in original). Between 1923 and 1967, more than 50,000 men were arrested on this charge in New York City alone. George Chauncey, *A Gay World, Vibrant and Forgotten*, Baltimore Sun, June 28, 1994, at 9A.

The criminalization of a gay person's self-expression and affection was also possible because until 1961, all fifty states outlawed sodomy—thus rendering it illegal for gay men and lesbians to engage in intimate acts with loved ones. Same-sex intimate sexual conduct was criminalized under thirteen states' sodomy laws until 2003, when such laws were finally declared unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003). By making private, consensual sexual conduct a crime, states touched "upon the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* at 567. In so doing, moreover, states set off a domino effect. By criminalizing homosexual conduct, states effectively criminalized all gay men and lesbians, thus breeding and legitimizing ever more pernicious discrimination. *Id.* at 575.

Armed with such broadly worded statutes, during the middle of the last century, police departments in many cities—including, as will be explained below, cities in Maryland—engaged

in stakeouts of gay establishments; decoy operations, whereby gay men could be charged with sexual solicitation of undercover officers; and police raids, which netted large numbers of socializing gay men and lesbians on charges such as disorderly conduct and cross-dressing. See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 63-64 (1999) (“Eskridge, *Gaylaw*”) (describing arrests for, *inter alia*, same-sex dancing, hugging, and kissing and wearing “mannish” dress); see also John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970* at 49-51 (1983) (“D’Emilio, *Homosexual Minority*”).

Disorderly conduct and sodomy laws, as well as aggressive police conduct to enforce these statutes, obviously had immediate and devastating consequences for the thousands ensnared. But they also had a less immediate—but no less important—consequence: They relegated gay men and lesbians to a no-man’s-land, where they were constantly under surveillance, scrutiny, and potential attack, whether in public places or in private homes.

2. Family Life

Legislatures and courts have also denied gay men and lesbians the ability to adopt children and, in some instances, even to visit or raise their own offspring—not to mention marry the person of their choice. Such denials, of course, go to the very heart of personhood.

As recently as 2004, the Eleventh Circuit upheld a Florida law prohibiting lesbians and gay men from adopting children. See *Lofton v. Department of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005). At least three other states (Michigan, Mississippi, and Utah) explicitly forbid gay couples from adopting, see *In re Adams*, 473 N.W.2d 712, 714 (Mich. Ct. App. 1991); Op. Mich. Att’y Gen 7160 (2004); Miss. Code Ann. § 93-17-3; Utah Code § 78-30-1, and a number of additional states are considering

imposing formal bans, *see* Amanda Paulson, *Several States Weigh Ban on Gay Adoptions*, *Christian Science Monitor*, Mar. 15, 2006, at 2.^{3/}

Courts have also held that a parent's same-sex orientation is a relevant consideration in child custody and visitation rights decisions—and have limited or denied custody and visitation on that basis. *See Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (“When a noncustodial parent is involved in a continuing homosexual relationship, restrictions on that parent’s visitation rights have been widely held to be proper.”). Indeed, as recently as 2002, the Alabama Chief Justice explained: “The common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent.” *Ex parte H.H.*, 830 So. 2d 21, 35 (Ala. 2002) (Moore, C.J., concurring) (internal quotation and citation omitted); *see also Ex parte D.W.W.*, 717 So. 2d at 796 (upholding restrictions on a divorced mother’s visitation with her children because, *inter alia*, the mother was a lesbian and “the conduct inherent in lesbianism is illegal in Alabama”); *id.* at 797-798 (Kennedy, J., dissenting) (noting that the father who was awarded custody, while the mother was denied full visitation, had been charged with domestic abuse on three occasions, had closed his infant son in a clothes dryer, and had threatened to kill the children); *Bottoms v. Bottoms*, 457 S.E. 2d 102, 108 (Va. 1995) (wresting custody away from a mother, in favor of the child’s grandmother, because the mother was a lesbian and, *inter alia*, “[c]onduct inherent in lesbianism

^{3/} Fortunately, the courts and agencies of Maryland have recognized that an individual’s sexual orientation bears no relationship to his or her ability to create families or adopt children. *See, e.g., Boswell v. Boswell*, 352 Md. 204 (1998); *S.F. v. M.D.*, 132 Md. App. 99, 112-114 (2000); Md. Regs. Code tit. 7 §§ 05.03.09(A)(2), 05.03.15(C)(2) (prohibiting discrimination based on sexual orientation by private adoption agencies). Nevertheless, gay men and lesbians in Maryland continue to suffer discrimination with regard to their family lives. *See infra* § II.B.2.

is punishable as a Class 6 felony in the Commonwealth”);^{4/} *S v. S*, 608 S.W.2d 64, 65-66 (Ky. Ct. App. 1980) (requiring that child custody be shifted from mother to father because of the mother’s “deviate practice” as a lesbian).

Finally, of course, gay men and lesbians are barred in every state except Massachusetts from marrying the person of their choice. “Marriage is one of the ‘basic civil rights of man’” *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citation omitted). “Without the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one’s ‘avowed commitment to an intimate and lasting human relationship.’” *Goodridge*, 798 N.E.2d at 957 (citation omitted). Deprivation of this basic civil right is a glaring example of the discrimination suffered by gay men and lesbians on a daily basis.

3. Employment

Gay men and lesbians have also long been denied employment in various fields. In 1947, for instance, the U.S. Civil Service Commission ruled that “homosexuality” was “sufficient grounds for denying appointment to a Government position or for the removal of a person from

^{4/} These decisions highlight the insidious effect of sodomy laws, as explained above: In the eyes of many courts, because sodomy was a crime and gay and lesbian parents engaged in sodomy, gay men and lesbians were rendered criminals and therefore unfit for parenting. See *Lawrence*, 539 U.S. at 575-576 (discussing the “collateral consequences” imposed by sodomy bans). These decisions also highlight—while ironically perpetuating—the invidious discrimination experienced by gay men and lesbians in American society. See, e.g., *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982) (affirming lower court’s decision to remove a child from his lesbian mother’s custody because, if raised by his mother, the child would, *inter alia*, “‘very definitely’ encounter prejudices against homosexuals”); *Jacobson v. Jacobson*, 314 N.W. 2d 78, 81 (N.D. 1981) (reversing lower court’s determination and concluding that the father should be awarded custody because the mother was a lesbian living with her partner and “living in the same house with their mother and her lover may well cause the children to ‘suffer the slings and arrows of a disapproving society’”), *overruled by Damron v. Damron*, 670 N.W. 2d 871, 876 (N.D. 2003).

the Federal service.” Eskridge, *Gaylaw* at 69. Between 1947 and 1950, the Commission consequently denied government employment to 1,700 applicants because they had “a record of homosexuality or other sex perversion.” *Id.*; *see also* S. Rep. No. 81-241, at 9 (1950).

A few years after the Commission’s ruling, in 1950, the Senate conducted a special investigation into the “Employment of Homosexuals and Other Sex Perverts in Government” in order to “consider reasons why their employment by the Government is undesirable; and to examine into the efficacy of the methods used in dealing with the problem.” S. Rep. No. 241-81, at 1. The Senate subcommittee ultimately concluded that gay men were unfit for federal employment “for two reasons; first, they are generally unsuitable, and second, they constitute security risks.” *Id.* at 3. The subcommittee explained that gay men were unsuitable because they “lack the emotional stability of normal persons,” and “indulgence in acts of sexual perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.” *Id.* at 4. Gay men were security risks, according to the subcommittee, because their “lack of emotional stability . . . makes them susceptible to the blandishments of the foreign espionage agent.” *Id.* at 5. For these reasons, the subcommittee concluded: “[I]t is in the public interest to get sex perverts out of the Government and keep them out.” *Id.* at 20. This could be accomplished, the subcommittee found, if “the problem is handled properly.” *Id.* at 6; *see also* Eskridge, *Gaylaw* 69; Chauncey, *Why Marriage* 20; D’Emilio, *Homosexual Minority* 41-43; Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1565 (1993) (“Cain, *A Legal History*”).

“Handled properly” it was. A few years after the subcommittee report was issued, in 1953, President Eisenhower set forth Executive Order 10,450, which required the dismissal of *all* government employees who were “sex perverts,” including homosexuals, from both the civilian

and military branches of the federal government. Cain, *A Legal History* 1565-1566. This Executive Order also required all private corporations with federal contracts to ferret out and discharge their gay employees. As a result, thousands of men and women were fired or forced to resign from their jobs because they were gay or suspected of being gay. *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989). This ban—which presumably affected many gay and lesbian Maryland residents in the Washington metropolitan area—remained in effect until 1975.

While service in the federal government was thus out of reach for most gay men and lesbians during much of the last century, the United States military and federal and state law enforcement were particularly hostile. In many ways, the hostility persists to the present day.

In the middle of the last century, the military adopted a “firm and aggressive attitude” and “followed a rather uniform and consistent pattern of ferreting out and removing” gay men and lesbians. S. Rep. No. 81-241, at 8-9; see *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. at 13-14 (1993) (“S.A.S.C. Hearing”) (statement of Dr. David F. Burrelli). In 1982, the Department of Defense adopted a more formal policy mandating the dismissal of gay men and lesbians in order to, among other things, “ensure the integrity of the system of rank and command” and “prevent breaches of security.” *Id.* at 15; see also *Dronenburg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984).

As late as 1993, some urged retention of an outright ban on the admission of gay men and lesbians because they could not be trusted and were self-centered, “deviant,” and “[i]ndecent,” *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong. at 89-90, 92 (1993) (“H.A.S.C. Hearing”)

(statement of Col. John Ripley), and because lifting the ban would legitimize “a homosexual lifestyle when the homosexual act is an unnatural act and one that is prohibited by law,” *id.* at 3 (statement of Rep. Floyd Spence). Currently, under the so-called “Don’t Ask, Don’t Tell” policy, evidence that a servicemember has engaged in homosexual conduct or intends to do so still renders the individual ineligible for service in the armed forces. *See* 10 U.S.C. § 654 (“The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”); *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997).⁵

Similarly, as recently as 1979, the FBI formally announced that it “has always had an absolute policy of dismissing proven or admitted homosexuals from its employ.” *Ashton v. Civiletti*, 613 F.2d 923, 926 (D.C. Cir. 1979); *see also Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). Local police departments, also, have long barred gay men and lesbians from serving in their ranks. *See, e.g., City of Dallas v. England*, 846 S.W.2d 957, 958 (Tex. App. 1993) (considering constitutionality of Dallas Police Department’s policy of not hiring anyone who had engaged in sexual conduct with a member of the same sex); *Childers v. Dallas Police Dep’t*, 513 F. Supp. 134, 142 (N.D. Tex. 1981), *aff’d*, 669 F.2d 732 (5th Cir. 1982) (concluding that hiring the plaintiff, an “admitted homosexual who actively publicized his lifestyle,” would “undermine[] the legitimate needs for obedience and discipline within the police department”).

⁵ Other countries—including Australia, Canada, Israel, and Britain—allow gays and lesbians to serve openly in the military. *See* Aaron Belkin, *Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?* 3 Parameters: US War Army College Quarterly 108 (2003), available at http://www.gaymilitary.ucsb.edu/Publications/2003_BelkinInParameter.pdf.

Gay men and lesbians have also faced great hostility when seeking to teach in the Nation's schools. Countless school districts have fired gay men and lesbians on the grounds that one's gay or lesbian identity disrupts the learning process, poses a threat to his or her students—or simply renders him or her unfit to teach. *See, e.g., Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting from denial of certiorari) (“Petitioner, a public high school employee, ‘was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason.’” (quoting 730 F.2d 444, 454 (6th Cir. 1984) (Edwards, J., dissenting))); *National Gay Task Force v. Bd. of Educ.*, 470 U.S. 903 (1985) (per curiam), *aff'g* 729 F.2d 1270 (10th Cir. 1984) (upholding, with one exception, Oklahoma statute authorizing dismissal of teachers for engaging in “public homosexual conduct or activity”); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977) (upholding a teacher's dismissal based on the school board's policy which provided for the discharge of school employees on the ground of “immorality” based on the teacher's status as a homosexual); *Gish v. Board of Educ.*, 366 A.2d 1337, 1340 (N.J. Super. Ct. 1976) (upholding school's requirement that teacher be forced to undergo psychiatric examination because of his public activities supporting gay rights). More recently, one district imposed a gag order on a teacher, instructing her not to discuss her sexuality. *See Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1281-1282, (D. Utah 1998) (holding that the restriction violated the First and Fourteenth Amendments).

4. “Psychotic Personality”

Gay men and lesbians have also been deemed “psychopaths” and “deviants,” with devastating consequences. By the early 1970s, laws sanctioning the often-indeterminate commitment of “psychopathic” sex offenders had been enacted by the majority of states and the

District of Columbia. In five states, all that was required to trigger indefinite commitment was “cause” to believe that “the person is probably a sexual psychopath.” *Davy v. Sullivan*, 354 F. Supp. 1320, 1323 nn.2 & 3 (M.D. Ala. 1973); see D’Emilio, *Homosexual Minority* 50-51 (1983) (after a kidnapping and murder of a young boy in Sioux City, the county attorney ordered the detention of known local homosexuals pursuant to Iowa’s sexual psychopath law and consequently had twenty-nine men committed to asylums); Eskridge, *Gaylaw*, App B1, at 354-355. Sodomy, including sodomy between consenting adults, provided the most common jurisdictional basis for commitment. Eskridge, *Gaylaw* 61; see also William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1067-1068 (1997).

Once institutionalized, gay men and lesbians were sometimes subjected to “therapies” ranging from the comparatively less invasive—such as psychotherapy and hypnosis—to the more severe, such as aversion therapy, castration, hysterectomies, lobotomies, electroshock treatment, and the administration of untested drugs. See D’Emilio, *Homosexual Minority* at 17-18; Eskridge, *Gaylaw* 62; see also *id.* at 42 (2,000 prefrontal lobotomies were performed on sex offenders between 1938 and 1946). Committed individuals could also be transferred to prison, to serve indefinite sentences.

Alabama presents a case in point. In 1961, Alabama revised its criminal sexual psychopath laws to allow for the civil commitment or imprisonment of any “criminal sexual psychopath.” Civil commitment could be triggered by a simple finding that that the individual suffered from a “mental disorder,” exhibited “criminal propensities to the commission of sex offenses,” and had been charged (although not necessarily convicted) with a sex offense. *Davy*, 354 F. Supp. at 1323, 1327 (quotation omitted). This commitment would last, pursuant to the

statute, until the individual was found to have “fully and permanently recovered” (a finding which was rarely, if ever, made). *Id.* at 1323, 1327 n.11 (quotation omitted). If at any time the Superintendent of the State Hospital concluded that an individual’s “treatment” could occur in prison, the “sex deviate” could be then transferred indefinitely to a state penitentiary, even though he had not been tried (much less convicted) of any crime. *Id.* at 1328.⁶¹

The federal government also officially equated homosexuality with a mental disorder. The Immigration Act of 1917 prohibited the entry of gay men and lesbians into the country by way of a provision which excluded “persons of constitutional psychopathic inferiority” certified by a physician to be “mentally . . . defective.” *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569, 571-572 (N.D. Cal. 1982) (internal quotation omitted), *aff’d sub nom. Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983). Later, gay men and lesbians were officially excluded from entry to the United States as persons with a “psychopathic personality.” *Boutilier v. INS*, 387 U.S. 118, 122 (1967) (concluding that Congress used the phrase “psychopathic personality” “to effectuate its purpose to exclude all homosexuals and other sex perverts”). Until 1965, gay men and lesbians were accordingly excluded from admission into the United States as psychopaths under 8 U.S.C. § 1182(a)(4), and until 1990, United States immigration laws permitted authorities to deny a person the right to immigrate to the United States on account of his or her sexual orientation. Eskridge, *Gaylaw* at 132-134; *see also* Cain, *A Legal History* at 1593.

The military, too, has equated homosexuality with mental illness. Prior to the 1970s, the military treated gay men as unfit for service because they had a personality disorder. S.A.S.C. Hearing 13-14 (statement of Dr. David F. Burrelli). In World War II, for instance, “psychiatrists

⁶¹ *See also* James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 *Law & Sexuality* 1, 75-76 & nn.355-365 (2001) (“Garland, *The Low Road to Violence*”).

attempted to identify and ‘treat’ homosexuals in uniform.” *Id.* at 14. Those who did not respond to “treatment” were discharged for “inaptness or undesirable habits.” *Id.* Long after World War II, it appears that this view of gay men and lesbians persisted in at least one Defense Department document. A “Defense Department Instruction,” signed by a Pentagon undersecretary a mere decade ago and re-certified as “current” in 2003, classified homosexuality as a mental disorder and “defect,” alongside mental retardation and personality disorders. *See* The Associated Press, *Pentagon File Says Gays Have Disorder*, *Newsday*, June 21, 2006, at A29.

For much of the last century, psychiatric organizations fueled and perpetuated the belief that gay men and lesbians were mentally ill. It was not until 1973 that the American Psychiatric Association removed homosexuality from its classification as a mental illness. The American Psychological Association and American Medical Association then followed. Chauncey, *Why Marriage* 37.

5. Victims of Hate Crime; Objects of Ridicule

Over the last three decades, some discriminatory laws have been relaxed and more and more gay men and lesbians have refused to hide their sexual orientation—but not without severe repercussions. The United States Surgeon General approximates that 45% of gay men and lesbians have been threatened with violence as a result of their sexual orientation, and 17% have been physically attacked. U.S. Surgeon General, *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior*, at 4 (July 9, 2001) (“*Surgeon General's Call to Action*”)²¹; *see also* The Henry J. Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays, and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation* 2 (2001) (“*Kaiser, Inside-OUT*”) (noting

²¹ Available at <http://www.surgeongeneral.gov/library/sexualhealth/call.htm>.

that, in its study, about one third of lesbians, gay men, and bisexuals reported that they had been the target of physical violence).^{8/}

It should therefore come as no surprise that gay men and lesbians have consistently ranked among the leading targets of hate crimes. The FBI has reported that sexual orientation prejudice accounted for 15.6% of bias-motivated crimes in 2003. Only crimes based on race or religious identity ranked higher. FBI, *Hate Crime Statistics 2004* (2005). Indeed, when hate crime data are adjusted for the prevalence of the group in the population, gay men and lesbians report hate crimes at a per capita rate *higher than any other group*. William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 *Tulane L. Rev.* 1214, 1215, 1229, 1232 (2004) (“Rubenstein, *The Real Story*”).^{9/}

While a not-insubstantial number of gay men and lesbians are physically targeted, many more are exposed to society’s disapprobation in more subtle—if not ultimately less harmful—ways. In 2001, a national survey found that 74% of lesbians, gay men, and bisexuals reported having experienced prejudice and discrimination based on their sexual orientation. Kaiser,

^{8/} Available at <http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf>.

^{9/} The number of reported hate crimes likely represents only a fraction of such crimes. Because reporting of hate crimes by law enforcement agencies is voluntary, the thoroughness of police statistics—and the characterization of crimes—differ widely among jurisdictions. In addition, many victims fail to report their experiences because they fear secondary harassment by the police, lack confidence that the assailants will be caught, worry about reprisals from their assailant, and/or fear being “outed” by a subsequent police investigation. See, e.g., Rubenstein, *The Real Story* 1218-1222.

Inside-OUT 3. Likewise, the Surgeon General estimates that 80% of gay men and lesbians have been verbally or physically harassed. *Surgeon General's Call to Action* 4.^{10/}

The demeaning of gay people starts at a young age. “[S]tudies demonstrate that academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal abuse at school.” *Harper*, 445 F.3d at 1179 (quotation omitted). In a recent survey, more than one quarter of gay, lesbian, and bisexual students “reported missing at least one entire day of school in the previous month because they felt unsafe due to their sexual orientation.” Nat’l Ass’n of Sch. Psychologists, *Position Statement on Sexual Minority Youth* 1 (2004).^{11/}

This private targeting of gay men and lesbians by private individuals cannot be decoupled from *de jure* discrimination. “Reductions in bias-motivated violence in the United States have only followed gains in substantive equality, as well as the infusion of resources into law enforcement to ensure that government protects hate crime victims from harm.” Garland, *The Low Road to Violence* 23 & n.81. In other words, the lack of legal protections on the basis of sexual orientation helps to foster discrimination and hate crime activity against gay men and lesbians.

^{10/} Based on the foregoing, it should be no surprise that “the majority of lesbians, gays, and bisexuals believe they are the group in America most likely to experience prejudice and discrimination and least likely to be protected by the government.” Kaiser, *Inside-OUT* 2.

^{11/} Available at http://www.nasponline.org/information/pospaper_glb.html. Presumably because of peer harassment, social isolation, and verbal abuse—as well as the absenteeism that results from such a hostile environment—“gay teens suffer a school dropout rate over three times the national average.” *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179 (9th Cir. 2006) (citation omitted).

B. Gay Men And Lesbians In Maryland Have Long Been Subjected To Invidious Discrimination, And This Discrimination Continues To The Present Day

As the State of Maryland has recognized (and even documented), gay men and lesbians in the state have experienced a similar history of discrimination. As in the Nation generally, sexual orientation discrimination in Maryland has taken many forms and has limited and diminished virtually every sphere of life. Gay men and lesbians have been discriminated against in pursuing private lives and personal relationships and in attempting to adopt and rear children. They have faced hostile treatment at the hands of medical professionals—and have been barred from spending time with, and making key end-of-life decisions for, their partners.¹² They have been fired from their jobs and, while employed, faced harassment and ridicule. In addition, they have been subjected to physical violence and harassment in schools and on the street. This discrimination unfortunately persists, and gay men and lesbians in Maryland are not yet able to “live their lives free from the painful burden of personal, arbitrary discrimination.” Special Commission to Study Sexual Orientation Discrimination in Maryland, Interim Report, Memo to Gov. Glendening, at 1 (Dec. 15, 2000) (“Commission Interim Report Memo”).^{13/}

¹² See, e.g., *Hearing on S.B. 796 before Sen. Educ., Health, and Env't'l Affairs Comm.*, Mar. 18, 2005 (statement of Ellwanger) (after his partner suffered a grand mal seizure, he was forced to authorize medical procedures through his partner's estranged family in Kentucky and was at the “mercy” of the hospital staff for access to and information about his partner); *id.* (statement of Flanigan) (although he had medical power of attorney, staff at the medical facility refused him access to his partner until his partner had lost consciousness).

^{13/} Gay men and lesbians in Maryland also face housing discrimination, in attempting both to buy homes, *see* MCHR Annual Report 2001 at 9, *available at* <http://www.mchr.state.md.us/2001finalannualreport.pdf>. (noting that same-gender applicants are more likely to be rejected when applying for home mortgages), and to rent apartments, *see, e.g.*, Commission Interim Report Memo at 13-14 (detailing numerous instances of housing discrimination)

1. Private Lives and Personal Relationships

Gay men and lesbians have long been prosecuted in Maryland for engaging in private and consensual intimate acts. Indeed, *Davis v. State*, 3 H. & J. 154 (1810), the first reported sodomy case in the United States, is a decision by the Maryland Court of Appeals. In that case, this Court upheld an indictment charging Davis with the crime of sodomy, “that most horrid and detestable crime (among Christians not to be named).” 3 H. & J. at 154; *see also* George Painter, *The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States—Maryland 2* (2004).^{14/}

In modern times, Maryland’s laws against sodomy, Md. Code art. 27 § 553 (1967); “unnatural and perverted practices,” which included fellatio, *id.* § 554; and “lewdness,” which prohibited solicitation to perform any “unnatural sexual practice,” *id.* § 15, applied to both heterosexual and homosexual conduct. Nevertheless, the State enforced these laws disproportionately against Maryland’s gay community. This disproportionate burden was, in fact, officially sanctioned in 1990, when, in the case of *Schochet v. State*, this Court held that Maryland’s “unnatural and perverted practices” statute prohibited homosexual activity but did not prohibit private, noncommercial, heterosexual activity between consenting adults. 320 Md. 714, 734-735 (1990).

Maryland’s sodomy statute was not only broadly worded, it was vigorously enforced. From 1946 through 1965, there were a total of 384 sodomy, crimes against nature, and sexual perversion arrests in Baltimore alone. Eskridge, *Gaylaw*, App. C1, at 374. After being arrested for sodomy, Md. Code art. 27 § 553, or fellatio, *id.* § 554, gay men faced prison sentences of up to ten years. *See, e.g., Canter v. State*, 224 Md. 483, 484-485 (1961) (upholding three-year-

^{14/} Available at <http://www.sodomylaws.org/sensibilities/Maryland.htm>.

sentence for consensual sodomy between two adult men). Moreover, even when arrests were not made, Maryland's sexual perversion statutes enabled law enforcement to raid gay hangouts and expose gay individuals to scrutiny and ridicule. In an infamous 1955 crackdown on public vice, for example, police in Baltimore raided a popular gay hangout, the Pepper Hill Club, arresting 162 people for disorderly conduct based on "immoral conditions" at the club and "evidence of homosexuality." Eskridge, *Gaylaw* 64 (162 people arrested at a club based on observation of same-sex hugging and kissing).

While the raid on the Pepper Hill Club was notorious, it was not exceptional. During the middle of the last century, undercover vice police in Baltimore and other cities regularly made arrests at places frequented by Maryland's gay community. See Robert G. Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private Sexual Consenting Adult Homosexual Behavior Be Excluded?*, 30 Md. L. Rev. 91, 97 (1970). Once arrested, men often found their names, addresses, and the charges against them published in local newspapers, often with devastating consequences. See *id.* at 93 (two men who were arrested in a public restroom in 1965 subsequently committed suicide); see also M. Jane Taylor, *Picking Up the Pieces*, Wash. Blade, Jun. 19, 1998 (musical director and organist at Severna Park church fired after name and charge were printed in local paper). Indeed, as recently as 1997, police in Anne Arundel County conducted a series of stings at adult bookstores and other locations and arrested dozens of men on charges such as solicitation (i.e., a request to engage in consensual, private sex), and those arrested had their names and addresses publicized. See *Dozens Busted for Lewdness at Adult Store*, Annapolis Capital-Gazette, Aug. 12, 1997; *Gay Sex Busts Called Unfair*, Annapolis Capital Gazette, Nov. 9, 1997. And police in Maryland have continued aggressively to target for surveillance areas where gay men congregate. See Matthew Daly, 10

Arrests at Md. Park, Wash. Post, Sept. 2, 1986, at B5 (“Officials at Greenbelt National Park . . . restricted the use of a secluded picnic area frequented by gay men.”).

Only in the past decade has Maryland decriminalized private, consensual same-sex sodomy. See *Williams v. Glendening*, No. 98036031/CL-1059, 1998 WL 965992, at *7 (Md. Cir. Ct. Oct. 15, 1998) (declaring that Md. Code art. 27, § 554 does not apply to private, consensual, non-commercial sexual activity, regardless of whether that activity is engaged in by opposite-sex or same-sex couples, while upholding 27, § 15 (outlawing lewdness)); Lisa Keen, *Judge to Drop Sodomy Laws*, Wash. Blade, Jan. 15, 1999.

2. Family Lives

Until recently, although gay and lesbian parents faced few explicit prohibitions in Maryland family law, they had such scant protection that any brush with the legal system brought the risk of hostile or unfair treatment. Even now, protections are few, leaving Maryland’s gay and lesbian community vulnerable to mistreatment at the hands of both state officials and private citizens.

In much of the 1990s, a biological parent’s sexual orientation could be grounds for denying parental visitation rights—and in order to spend time with their children, judges sometimes ordered parents to hide their gay identities. See *Boswell v. Boswell*, 352 Md. 204, 211, 238 (1998) (reviewing Circuit Court order that prohibited a gay father from having overnight visits with his children and specified that the father could not see his children in the company of his partner or “anyone having homosexual tendencies or such persuasions”); *North v. North*, 102 Md. App. 1, 5 (1994) (reviewing Circuit Court order that denied gay father overnight and extended visitation and specified that the father could not expose his children to “events or functions espousing his alternative lifestyle”).

Until 1999, the non-adoptive partner of a biological parent had no more standing to seek custody or visitation than a complete stranger. And until 1996, Maryland had never granted a second-parent adoption. See Anna Ditkoff, *Unmarried with Children*, Baltimore City Paper, Jun. 9, 2004; see also Human Rights Campaign, *Information on Second-Parent Adoption*.^{15/}

While the law is changing, the advancements do not reflect statutory changes, and only the question of visitation rights could be called “well settled.” As a result, the ability of gay men and lesbians in Maryland to raise or adopt children depends almost entirely on the whim of a particular judge, leaving enormous potential for inequity, discrimination, and abuse.

3. Employment

Gay men and lesbians in Maryland have also faced discrimination in the workplace. Gay people pursuing careers in positions of public trust have often faced explicitly discriminatory hiring policies. For instance, as recently as 1992, a lesbian was denied employment by the state police on the ground that homosexuality was “socially unacceptable conduct,” and “it was the policy of the state police to refuse employment to homosexuals.” David Michael Ettlin, *Lesbian Sues State Police*, Baltimore Sun, Nov. 18, 1992, at 1C.

As in the nation more generally, gay and lesbian teachers have faced particular hostility. In the 1970s, for instance, when a gay teacher was accidentally “outed,” the Montgomery County school board reassigned the teacher to a non-teaching position and refused to renew his contract. See *Acanfora v. Board of Educ. of Montgomery County*, 359 F. Supp. 843, 845-846 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974). During that litigation, the Deputy Secretary of Education conceded “that the Board of Education would not knowingly hire a

^{15/} Available at <http://www.hrc.org/Template.cfm?Section=Adoption&CONTENTID=18341&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

homosexual.” *Id.* at 845; *see also* 491 F.2d at 501 (“The school officials admit that if Acanfora had revealed his affiliation with the Homophiles they would not have employed him.”). And an expert witness testified that it would be impossible for the students to separate the teacher’s homosexual identity from his identity as an earth science teacher. 359 F. Supp. at 847.

The private sector has at times been similarly hostile. Gay men and lesbians have been fired on account of their sexual orientation. *See, e.g.*, Commission Interim Report at 11 (financial services executive in Cumberland fired by employer who “did not accept his gay lifestyle”); *id.* at 13 (attorney lost his job at a Bethesda law firm when law partner found out that he was gay). Some have been denied employment altogether. *See, e.g.*, Laura Lippman, *Gays Say They Are “In Fear” For Jobs Until Discrimination Bill Is Law*, Baltimore Sun, Feb. 14, 1992, at 3B (man lost a promised job when his employer learned of his sexual orientation). Many others, lucky enough to secure employment, have faced hostile work environments. *See, e.g.*, Commission Interim Report at 11 (Ocean City restaurant worker was forced to resign after co-workers referred to him as “fag,” “homo,” and “queer” and wrote on the restroom wall: “Don’t use this bathroom—Queer with AIDS here”).

Hoping to put an end to these inequities, in 2001, the General Assembly joined a number of Maryland localities in enacting anti-discrimination measures to protect gay men and lesbians from employment discrimination. *See* Md. Code art. 49B (covering employment, housing, and public accommodations). But while passage of the Anti-Discrimination Act signals an increasing acceptance of gay men and lesbians and ensures that those who fall prey to sexual orientation discrimination have some hope of redress, employment discrimination persists. Since 2002, eighty-eight total complaints of sexual orientation employment discrimination have been

reported to the Maryland Commission on Human Relations (“MCHR”).^{16/} While this number is itself substantial, sexual orientation discrimination is almost certainly more prevalent than the number of complaints would suggest because, as with hate crimes, *see supra* n.9, such discrimination tends to be under-reported, as many gay men and lesbian employees endure discrimination in silence, fearing that complaining will “out” them or expose them to further harassment. *See, e.g.*, MCHR Testimony at 1 (“The victims of sexual orientation discrimination are reluctant to come forward. If they make a complaint, they risk exposure to further discrimination and even physical abuse.”).

4. Targets for Hate Crimes and Bias Incidents

Gay men and lesbians in Maryland are “regularly victimized.” Commission Interim Report Memo at 1. According to the FBI, from 1996 to 2004, there were 123 reported anti-gay, lesbian, bisexual, and transgender hate crimes in Maryland.^{17/} In 2003, a year in which Maryland ranked ninth in the country, there were 42 reported sexual orientation incidents,^{18/} comprising 7.9% of the state’s total, the largest total after incidents targeting African-Americans (53.2%)

^{16/} *See* MCHR Annual Report 2002, at 9; MCHR Annual Report 2003, at 10; MCHR Annual Report 2004, at 14; MCHR Annual Report 2005, at 15. Gay men and lesbians file sexual orientation discrimination complaints in roughly equal proportion to the per capita number of filings lodged by racial minorities and women—two groups denominated suspect classes. *See* William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. Cal. L. Rev. 65, 67-68 (2001).

^{17/} *See* FBI, Uniform Crime Reports: Hate Crime Statistics (“FBI Hate Crimes Statistics”) 1996, at 37; FBI Hate Crimes Statistics 1997, at 36-37; FBI Hate Crimes Statistics 1998, at 36-37; FBI Hate Crimes Statistics 1999, at 29-30; FBI Hate Crimes Statistics 2000, at 31; FBI Hate Crimes Statistics 2001, at 35-36; FBI Hate Crimes Statistics 2002, at 35-36; FBI Hate Crimes Statistics 2003, at 37-38; FBI Hate Crimes Statistics 2004. *Available at* <http://www.fbi.gov/ucr/ucr.htm>.

^{18/} Unlike crime totals, incident totals include reports by victims and law enforcement of activities that are not necessarily criminal. Md. State Police Homeland Security and Intelligence Div., Report on Hate/Bias Incidents, H.B. 692 Bill File at 1 (2005).

and Jews (11.7%). Md. State Police Homeland Security and Intelligence Div., Report on Hate/Bias Incidents, H.B. 692 Bill File at 16 (2005). Of those 42 incidents, 30 targeted gay men—more than anti-Muslim, anti-Catholic and anti-Protestant incidents combined. *Id.*^{19/}

As is the case nationally, gay and lesbian youth are particularly vulnerable. Between January 1, 2002 and 2004, for example, there were 46 reported sexual-orientation-related incidents in Maryland public schools. MCHR Annual Report 2003, at 12. Recently, school officials in Anne Arundel County, using a broader definition of bias-motivated incident that includes harassment in the form of slurs and threats, reported that sexual-orientation-related offenses accounted for a full one-third of the incidents in County middle schools in the 2004-2005 school year. See Liz F. Kay, *School Plan Aims to Curb Bias Acts*, Baltimore Sun, July 22, 2005, at 1G.

* * * * *

Gay men and lesbians have long faced purposeful, invidious discrimination, both in Maryland and throughout the United States. Indeed, Justice William Brennan did not exaggerate when he wrote: “Outside of racial and religious minorities, we can think of no group which has suffered such ‘pernicious and sustained hostility’ and ‘such immediate and severe opprobrium’ as homosexuals.” *Rowland*, 470 U.S. at 1009 (Brennan, J., dissenting from denial of certiorari).

^{19/} See, e.g., David Simon, *Suspects in Beating Reject Accusation that Attack Grew from Anti-Gay Bias*, Baltimore Sun, June 19, 1992, at 4D (describing attack in which eight men with baseball bats beat a teenager they believed to be a male prostitute); *id.* (describing a 1992 attack in which a gay man was beaten to death with a wooden stake); *Divisive Rhetoric Creates Breeding Ground for Hate*, Baltimore Sun, Aug. 26, 1999, at 1B (discussing anti-gay leaflets distributed in Frederick County by the Ku Klux Klan); Dennis O’Brien and TaNoah Morgan, *Suspect Sought in Wounding of Cross-Dresser Victim*, Baltimore Sun, Nov. 8, 1998, at 4B (recounting incident wherein cross-dressing man was shot six times); Jay Apperson, *3 Dundalk Men Get Jail Terms for ‘Gay-Bashing’ Brawl*, Baltimore Sun, Sept. 10, 1993, at 4B (describing violent assault on patrons of predominantly gay bar).

The discrimination faced by gay men and lesbians is no less pernicious than the discrimination faced by other groups already protected as suspect classes. The factor “history of discrimination” is satisfied in this case.

III. SEXUAL ORIENTATION IS UNRELATED TO ONE’S ABILITY TO PERFORM IN OR CONTRIBUTE TO SOCIETY

The second factor sufficient to render a classification suspect for purposes of equal protection analysis is whether the object of the classification has “been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” *Waldron*, 289 Md. at 705 (quotation omitted). Gay men and lesbians unquestionably satisfy this standard for protection.

When a characteristic is irrelevant to an individual’s ability to perform or participate in society, a law that classifies on the basis of that characteristic is unlikely to be related to the achievement of any acceptable state interest. Such laws are instead more likely to reflect “outmoded notions of the relative capabilities” of those who possess such characteristics, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985), or “prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others,” *id.* at 440. In such circumstances, the lack of a relationship between the characteristic and a person’s ability or capacity gives rise to a concern that the governmental classification is not the result of “legislative rationality in pursuit of some legitimate objective,” but rather a reflection of “deep-seated prejudice,” thus necessitating especially careful scrutiny of the classification. *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).^{20/}

^{20/} Compare *Cleburne*, 473 U.S. at 442 (declining to subject classifications based on mental retardation to heightened scrutiny primarily because “it is undeniable . . . that those who are mentally retarded have a reduced ability to cope with and function in the every day world”), *with*

Like race, gender, illegitimacy, or national origin—and unlike intelligence, physical disability, or age, *see Cleburne*, 473 U.S. at 441—“[s]exual orientation plainly has no relevance to a person’s ability to perform or contribute to society,” *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring). Instead, discrimination against gay men and lesbians is the result of deep-seated prejudice and invidious stereotyping. *See* S. Rep. No. 103-112, at 282 (1994) (recognizing that “there is prejudice *based upon stereotypes* against gays and lesbians in American society” (emphasis added)); *Tanner*, 971 P.2d at 447 (“[C]ertainly 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.”); *see also Andersen*, 138 P.3d at 1031 (Fairhurst, J., dissenting). Put simply, gay men and lesbians have been treated less favorably, and subjected to unique disabilities, because of stereotyping, animus, and prejudice—and not because of innate or material differences between gay men and lesbians and others in society.

A. Contrary To The Myths That Have Triggered Anti-Gay Legislation and Fueled Anti-Gay Discrimination, Gay Men And Lesbians Are Not Mentally Ill, And They Do Not Pose A Threat To Children

Various myths linking homosexuality with mental illness and child molestation abound and have long contributed to the invidious discrimination lesbians and gay men experience. The evidence of these stereotypes is overwhelming—as is the evidence debunking these pernicious beliefs.

Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (“[W]hat differentiates sex from such non-suspect statuses as intelligence and physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”), and *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (classifications based on illegitimacy are subject to heightened scrutiny because the characteristic “bears no relation to the individual’s ability to participate in and contribute to society”).

As is clear from the discussion above, gay men and lesbians have been stereotyped as psychotic or mentally ill, and this stereotype has been used to justify not only the denial of employment but also arrests, institutionalizations, and exclusion from the United States. *See, e.g., Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 579 (observing that “the congressional decision to exclude homosexuals entry into the United States is based upon the premise that homosexuality is a mental illness”). Yet there is not one shred of truth to this odious belief. All major professional mental health organizations have affirmed that homosexuality is not a mental disorder. Both the American Psychiatric Association and the American Psychological Association have adopted resolutions stating that homosexuality is not correlated with any “impairment in judgment, stability, reliability or general social or vocational capabilities.” Am. Psychiatric Ass’n, *Homosexuality Position Statement* (1992);^{21/} Am. Psychological Ass’n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620 (1975); *see also* Am. Psychological Ass’n, *Sexual Orientation and Homosexuality*, at 2 (2004) (“APA, *Sexual Orientation and Homosexuality*”) (“Psychologists, psychiatrists, and other mental health professionals agree that homosexuality is not an illness, a mental disorder, or an emotional problem.”).^{22/}

Likewise, as noted above, gay men have also long been branded a threat to child welfare, and their sexual orientation has long been used to limit their ability to teach in schools and adopt children. Just last year, for example, the group Defend Maryland Marriage posted the following message on its website: “We believe it is necessary that church leaders across Maryland be exposed to the vile and militaristic agenda of extreme homosexual activists Moral leaders

^{21/} Available at http://www.psych.org/edu/other_res/lib_archives/archives/199216.pdf.

^{22/} Available at <http://www.apahelpcenter.org/articles/pdf.php?id=31>.

must become aware of [gay men and lesbian's] intent to sodomize our children." *All You Need Is Love*, The City Paper, Feb. 9, 2005.^{23/}

Yet the notion that gay men prey on young children is utterly groundless. See, e.g., Carole Jenny, et al., *Are Children at Risk of Sexual Abuse by Homosexuals?* 94 *Pediatrics* 41, 44 (1994) (in a recent study, only two abused children out of 269 (only .7%) were victimized by a potentially gay offender, a finding that makes gay men and lesbians proportionately less likely to abuse children than heterosexuals); APA, *Sexual Orientation and Homosexuality* at 3 ("There is no evidence to suggest that homosexuals molest children."); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1243 (1999), *rev'd on other grounds*, 530 U.S. 640 (2000) ("The myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished."); *State v. Bates*, 507 N.W.2d 847, 852 (Minn. Ct. App. 1993) ("The belief that homosexuals are attracted to prepubescent children is a baseless stereotype."); Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 4 (U.S. Dep't of Justice 2000) ("Females were more than six times as likely as males to be the victims of sexual assault as known to law enforcement agencies.").

^{23/} Likewise, in testimony concerning gay men and lesbians in the military, a House Member gave voice to this false and pernicious stereotype, stating: "Homosexual recruiting also takes place in the classroom . . . homosexual teachers have committed up to four-fifths of all molestation of pupils. . . ." H.A.S.C. Hearing 188 (statement of Rep. Stephen E. Buyer). Similarly, in 1992, "Colorado for Family Values," a group lobbying to limit gay rights, publicly asserted that gay men and lesbians were responsible for 50% of all child molestation. Carole Jenny, et al., *Are Children at Risk of Sexual Abuse by Homosexuals?* 94 *Pediatrics* 41, 41 (1994); see also *People v. Kosters*, 467 N.W.2d 311, 316 (Mich. 1991) (Cavanagh, C.J., dissenting) (recognizing that there is a "widespread prejudice in our society that homosexuals are generally more likely to sexually molest children").

B. Gay Men And Lesbians Are Loving, Nurturing Parents, And They Desire Stable, Committed Relationships

The myth that gay men and lesbians are unable to create (or are uninterested in creating) loving and stable homes for children similarly persists to the present day. *See, e.g.,* Br. of Am. Ctr. for Law & Justice, Northeast, Inc. as *Amicus Curiae* 10 (Md. Ct. App. No. 44). This myth is used to bar gay men and lesbians from engaging in the most fundamental and protected of activities, such as adopting children and raising their own offspring. Yet this stereotype, too, is without any basis in fact. There were almost 777,000 same-sex couples in the United States in 2005—a 30 percent increase from the estimated 600,000 in 2000. *See* Gary J. Gates, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey 1* (2006). An estimated six to fourteen million children are currently being raised in the United States by gay or lesbian parents. *See Baker v. State*, 744 A.2d 864, 881 (Vt. 1999); Timothy E. Lin, Note, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 Colum. L. Rev. 739, 740 n.5 (1999). Despite the lack of economic protections and social support available to these same-sex parents (which undoubtedly burdens the already difficult task of child rearing), scientific research has consistently shown that children of same-sex parents fare no differently than children of heterosexual parents. Every respected medical, psychological, and child-welfare organization that has addressed the topic has concluded what Plaintiff couples know from their own family experiences: Children of same-sex parents are as healthy, happy, and productive as their peers.

The American Psychological Association, representing more than 155,000 psychologists, has declared: “Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.” Am.

Psychological Ass'n, *Lesbian and Gay Parenting: A Resource for Psychologists* 8 (1995).^{24/}

And more recently, the American Psychological Association has concluded that “results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.” Am. Psychological Ass'n, *Resolution on Sexual Orientation, Parents, and Children* (July 2004).^{25/}

Similarly, in 2002, the American Academy of Pediatrics (“AAP”), the nation’s oldest and largest association of pediatricians, issued a technical report summarizing the “growing body of scientific literature demonstrat[ing] that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual.” AAP, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics*, 341, 341 (2002). The American Psychiatric Association, which has over 35,000 physician members, has likewise emphasized: “Research over the past 30 years has consistently demonstrated that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents.” Am. Psychiatric Ass'n, *Adoption and Co-parenting of Children by Same-sex Couples: Position Statement* (Dec. 13, 2002).^{26/}

^{24/} Available at <http://www.apa.org/pi/parent.html>.

^{25/} Available at <http://www.apa.org/pi/lgbc/policy/parentschildren.pdf> (internal citations omitted); see also Am. Academy of Child & Adolescent Psychiatry, *Gay, Lesbian & Bisexual Parents* (1999), available at <http://www.aacap.org/publications/policy/ps46.htm>; American Academy of Child and Adolescent Psychiatry, *Policy Statement: Gay, Lesbian, and Bisexual Parents* (June 1999), available at <http://www.aacap.org>; Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 U.C.L.A. L. Rev. 852, 876-884 (1985).

^{26/} Available at http://www.psych.org/news_room/press_releases/adoption_coparenting_121802.pdf.

Indeed, of the numerous studies published since 1980 comparing children from same-sex households with peers in traditional families, using measures of social adjustment, school performance, mental health and emotional resilience, the uniform finding has been “that there are no significant development differences between the two groups of children.” Benedict Carey, *Experts Dispute Bush on Gay-Adoption Issue*, N.Y. Times, Jan. 29, 2005, at A16; *see also Kids with Gay Parents Do Just Fine*, Parents Magazine, Feb. 2006, at 46 (reviewing fifteen different studies addressing the effects on children of growing up in same-sex households and concluding that such children “are no more likely to have problems with self-esteem, psychological adjustment, or gender identity than kids [raised] with heterosexual parents”).

The notion that gay men and lesbians favor sexual promiscuity over committed, family-centered, long-term relationships is similarly powerful and also used to justify discrimination against gay men and lesbians, including bans on allowing them to marry.^{27/} It is similarly devoid of any empirical support. In reality, most lesbians and gay men desire stable, committed, enduring partnerships. Between 40% and 60% of gay men and between 45% and 80% of lesbians are currently involved in romantic relationships. Am. Psychological Ass’n, Policy Stmt: *Sexual Orientation & Marriage* 1 (2004) (“APA: *Marriage*”).^{28/} More than one-quarter of gay men and lesbians live with a partner as if they were married, and 74% report that they would like to get legally married. Kaiser, *Inside-OUT* 4.

^{27/} See, e.g., Br. of Family Research Council as *Amicus Curiae* 35-37 (Md. Ct. App. No. 44) (arguing that gay and lesbian relationships are less stable and faithful than heterosexual relationships); H.A.S.C. Hearing 90 (statement of Col. John Ripley) (arguing that gay men are promiscuous by nature).

^{28/} Available at <http://www.apa.org/pi/lgbc/policy/marriage.html>.

Gay and lesbian couples, moreover, are just as happy and satisfied as heterosexual couples. Same-sex relationships are just as emotionally fulfilling as heterosexual relationships. APA: *Marriage 2*. Moreover, given the relative lack of social support, legal sanction, and public recognition provided to same-sex couples, same-sex relationships are remarkably stable and enduring. Lawrence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 *J. Marriage & Fam.* 880, 896 (2004). As a major study of heterosexual and gay couples in the United States undertaken in the early 1980s concluded: “‘Couplehood,’ either as reality or an aspiration, is as strong among gay people as it is among heterosexuals.” Philip Blumstein & Pepper Schwartz, *American Couples: Money, Work, Sex* 45 (1983).

* * * * *

In sum, one’s sexual orientation bears no relation to an individual’s ability to perform or participate in society. *See Gay Rights Coalition of Georgetown Univ. Law Ctr.*, 536 A.2d at 35. Despite the pernicious myths and stereotypes, which continue to fuel discrimination against gay men and lesbians, homosexuality is not a mental disorder, and one’s sexual orientation has no bearing on a person’s judgment, stability, reliability, or trustworthiness. Likewise, sexual orientation has no bearing on a person’s ability to rear healthy and happy children or enter into long-term, stable, loving, and committed relationships. Sexual orientation is not an accurate or appropriate proxy for anything else. Discrimination on the basis of sexual orientation, including Maryland’s marriage ban, is therefore not grounded in any legitimate recognition of innate differences, but is instead “grounded in such considerations [as] are deemed to reflect prejudice and antipathy.” *Cleburne*, 473 U.S. at 440. Accordingly, under this Court’s jurisprudence, sexual orientation is a suspect classification subject to strict scrutiny.

IV. SEXUAL ORIENTATION IS AN IMMUTABLE CHARACTERISTIC

If “immutability” factors into the determination of whether a classification is “suspect”—and it is not at all clear that it does—then this factor unquestionably militates in favor of recognizing sexual orientation as a suspect classification.

Neither the United States Supreme Court nor the Maryland Court of Appeals has ever held that immutability is a prerequisite to obtaining suspect class status. Indeed, this Court has never referenced immutability, and the Supreme Court’s consideration of this factor has been spotty at best. For instance, in *Cleburne*, the Court held that the mentally retarded did not constitute a suspect class, despite the determination that the characteristic was immutable, and the Court went out of its way to cast doubt in the importance of that factor. *See* 473 U.S. at 442 n.10. On the flip side, the Supreme Court has held that illegitimacy and alienage are suspect classifications, even though they are based on traits that can be changed, either by the marriage of one’s mother and father or by a change in one’s immigration status. *Id.* at 441 (explaining that illegitimacy is a suspect classification); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (stating that alienage is a suspect classification); *Tanner*, 971 P.2d at 446 (noting that alienage “may be changed almost at will”). In fact, in many cases, the Supreme Court has omitted immutability from the list of factors even relevant to the determination that a government classification is suspect. *See, e.g., Cleburne*, 473 U.S. at 440-441; *Murgia*, 427 U.S. at 313; *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

If “immutability” is a relevant variable in the suspect classification calculus, however, it is clear that sexual orientation qualifies. One’s sexual orientation is not the product of choice, and it is not susceptible to change. *See Plyler*, 457 U.S. at 216-217 n.14 (“legislation imposing special disabilities upon groups disfavored by virtue of circumstances *beyond their control*

suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish” (emphasis added)).

There is broad consensus in the scientific community that, regardless of whether an individual’s sexual orientation is caused by his or her genetic makeup, hormonal factors, social environment, or a combination of the three, *none* of these factors is under an individual’s control—and none supports the notion that an individual chooses his or her sexual orientation. Simply put: “Human beings cannot choose to be either gay or straight.” Am. Psychological Ass’n, *Briefing Sheet on Same-Sex Families & Relationships* 2 (2006).^{29/}

Moreover, a person’s sexual orientation cannot be changed either by a simple decision-making process or by medical intervention. *Id.* (recognizing that one’s sexual orientation cannot be voluntarily changed); see *Surgeon General’s Call to Action* 4 (“[T]here is no valid scientific evidence that sexual orientation can be changed.”). Although some have argued that so-called “reparative” or “conversion” therapy might eliminate same-sex desires, such therapy is “based on an understanding of homosexuality that has been rejected by all the major health and mental health professions.” *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel* 3.^{30/} There is no evidence that such “therapies” are

^{29/} Available at <http://www.apa.org/ppo/issues/lgbfamilybrf604a.html>. While the source of one’s sexual orientation is still unknown, a recent study published by the National Academy of Sciences provides new and powerful support for the notion that men’s sexual orientation is influenced by “prenatal mechanism(s), and not social and/or [child] rearing factors.” See Anthony F. Bogaert, *Biological Versus Nonbiological Older Brothers and Men’s Sexual Orientation*, 103 PNAS 10771, 10771 (2006).

^{30/} Available at <http://www.apa.org/pi/lgbc/publications/justthefacts.html>. This publication is a product of, and has been endorsed by, among others, the American Psychological Association, the American Academy of Pediatrics, the National Association of School Psychologists, the National Association of Social Workers, and the National Education Association.

effective, and they are likely dangerous. See *Gay Rights Coalition of Georgetown Univ. Law Ctr.*, 536 A.2d at 34 (“There is no reliable evidence that adult homosexual orientation . . . can be ‘cured.’”); Am. Psychiatric Ass’n, *Position Stmt. on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (2000) (“In the last four decades, ‘reparative’ therapists have not produced any rigorous scientific research to substantiate their claims of cure.”);^{31/} Br. of Am. Psychological Ass’n et al., *Lawrence v. Texas*, 02-102, available at 2003 WL 152338, at *13 (“To date . . . there have been no scientifically adequate research to show that interventions aimed at changing sexual orientation are effective or safe.”).^{32/}

Accordingly, to the extent immutability matters, one’s sexual orientation is an immutable characteristic. See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that “[s]exual orientation and sexual identity are immutable”). Being either gay or straight is not a product of choice, and it is not susceptible to change, either by force of will or with medical intervention. See *Gay Rights Coalition of Georgetown Univ. Law Ctr.*, 536 A.2d at 36.

^{31/} Available at http://www.psych.org/psych_pract/coppptherapyaddendum83100.cfma.

^{32/} Even if a person’s sexual orientation *could* be modified through psychological or behavioral techniques (which it cannot), that would not make gay people as a class unworthy of legal protection. Nor would it render anti-gay discrimination any less objectionable. It would be repugnant to suggest that forced change of a person’s sexual orientation, even if it were possible, is the only means by which a gay person could avoid societal discrimination. Indeed, the point of strict scrutiny is to prevent the government, except in the rarest of cases, from effectively forcing an individual to choose between being discriminated against and disavowing, where possible, a characteristic that is core to his or her identity. See *Karouni v. Gonzalez*, 399 F.3d 1163, 1173 (9th Cir. 2005) (holding that gay asylum seeker should not be required “to change ‘an innate characteristic . . . so fundamental,’ or to relinquish such an ‘integral part of [his] human freedom” (citations omitted)); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (stating that gay men’s “sexual identities are so fundamental to their human identities that they should not be required to change them”).

V. GAY MEN AND LESBIANS LACK THE POLITICAL POWER NECESSARY TO OBTAIN REDRESS FROM THE POLITICAL SYSTEM

A final factor sporadically considered by the United States Supreme Court in determining whether government classifications should be evaluated using heightened scrutiny is whether the burdened group lacks the political power necessary to obtain redress from the political branches of government. *See, e.g., Plyler*, 457 U.S. at 216 n.14 (listing “political powerlessness” as one of several possible indicia of suspectness); *San Antonio Ind. Sch. Dist.*, 411 U.S. at 28 (same). As with respect to immutability, the Maryland Court of Appeals has never held—or even suggested—that political powerlessness is a prerequisite to finding that a group is deserving of special protection, and so no analysis of political powerlessness is required. Nevertheless, to the extent this Court considers this factor, it too supports deeming sexual orientation a suspect class.

From the discussion of the history of discrimination set forth above, it is clear that gay men and lesbians have long been the objects of purposeful, government-sponsored discrimination and have been unable to counter that discrimination—or to obtain appropriate redress—through the political process.^{33/}

Ironically, the election of gay governmental officials and passage of anti-discrimination laws in recent years have led some to suggest that classifications based on sexual orientation do not warrant heightened scrutiny. *See, e.g., Ben-Shalom*, 881 F.2d at 466; *High Tech Gays*, 895

^{33/} Gay men and lesbians are unable to obtain redress, in part, because the stigma associated with homosexuality—and the prejudice and discrimination one faces if “out of the closet”—encourages many gay men and lesbians to hide their true identities, thus discouraging open participation in politics. *See Dean v. District of Columbia*, 653 A.2d 307, 349-350 (D.C. 1995) (Ferren, J., dissenting). Stigmatization and discrimination also affect the economic status of gay men and lesbians. Contrary to popular myth, gay men and lesbians do not possess disproportionate economic power. *See M.V. Lee Badgett, Income Inflation: The Myth of Affluence Among Gay, Lesbian, and Bisexual Americans*, available at <http://thetaskforce.org/downloads/income.pdf>.

F.2d at 574; accord *Romer v. Evans*, 517 U.S. 620, 645-646 (1996) (Scalia, J., dissenting). But neither the existence of a few openly gay representatives, nor the passage of scattered anti-discrimination laws protecting gay individuals passed by a minority of states, establishes a degree of political power that undermines the justification for close scrutiny of anti-gay legislation.

The Supreme Court deemed sex a suspect classification in the 1973 case of *Frontiero v. Richardson*—nine years after Congress passed Title VI of the Civil Rights Act of 1964 and a decade after Congress passed the Equal Pay Act of 1963—while explicitly recognizing “that the position of women in American has improved markedly in recent decades.” 411 U.S. at 686-688 (plurality opinion); see also *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”). Likewise, racial minorities were explicitly protected from certain forms of discrimination through the Civil Rights Acts of 1866 and 1870, decades before the Supreme Court began applying strict scrutiny to racial classifications. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866); Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 144 (1870).^{34/}

Despite a few hard-fought legislative victories in Maryland and elsewhere, see *supra* n.2, lesbians and gay men remain woefully underrepresented in this country’s—and this State’s—legislatures. A comparison to the situation of women in 1973, when gender classifications were found to warrant heightened scrutiny, is instructive. The plurality in *Frontiero*, 411 U.S. at 686

^{34/} Moreover, notwithstanding the great strides racial minorities and women have made in recent years to secure increased political power, courts continue to apply heightened scrutiny to statutes that classify on the basis of race and sex. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (applying heightened scrutiny to sex-based classification); *Grutter v. Bollinger*, 539 U.S. 306, 326-327 (2003) (applying heightened scrutiny to race-based classification).

n.17, premised its conclusion that “classifications based upon sex . . . are inherently suspect” on the fact that women were “vastly underrepresented” in the political arena. At the time, there had never been a woman president, there had never been a woman on the United States Supreme Court, there was not a woman in the United States Senate (although there had been in the past), and there were only fourteen women in the House of Representatives. *Id.*

In comparison, only recently have openly gay people dared to run for public office, and the number of openly gay elected officials remains miniscule. There has never been an openly gay president, Senator, or Supreme Court Justice. Only five openly gay individuals have served in the U.S. House of Representatives, and only three openly gay lawmakers have been elected to the Maryland legislature. Kimberly A.C. Wilson, *Delegate Uses Personal Story to Back Gay Partnerships*, Baltimore Sun, Mar. 5, 2004, at 4B. Indeed, in the nation as a whole, 511,000 people hold federal, state, or local elected office. Of those, a mere 305—or a meager .06%—are openly gay. Lornet Turnbull, *Gay and Lesbian Officials to Meet*, Seattle Times, Nov. 18, 2005, at B1.

In addition, the political gains in recent years—which themselves have been few and far between—have been met with notable failures and devastating reversals. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 439 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996) (“[W]hatever *bone fide* legislative victories gays, lesbians and bisexual may have achieved in recent years, those victories are being ‘rolled back’ at an unprecedented rate and in an unprecedented manner.”). Despite concerted efforts to enact federal hate crime legislation and a federal employment non-discrimination act protecting gay men and lesbians from abuse and discrimination, Congress has refused to pass such measures. On the other hand, in 1996, Congress passed the Defense of Marriage Act,

which restricts the federal definition of marriage to members of the opposite sex and denies federal funds and benefits to same-sex couples. Pub. L. No. 104-99 (1996). The President has urged passage of an amendment to the United States Constitution that would enshrine discrimination against gay men and lesbians, and the House of Representatives has passed a bill that would prevent federal courts from hearing certain cases involving the constitutionality of marriage for same-sex couples. Carolyn Lochhead, *House OKs Limit on Federal Courts Bill Would Prevent Suits Over Defense of Marriage Act*, San Fran. Chron., July 23, 2004, at A6. Likewise, in Maryland, shortly after the Circuit Court ruling in this case, the Maryland legislature took up (and fortunately, ultimately rejected for the third year in a row) a constitutional amendment to ban marriage for same-sex couples.

Perhaps the most telling signal of the relative powerlessness of gay men and lesbians is this lawsuit itself. The U.S. Supreme Court has held that “the right to marry . . . is a central part of the liberty protected by the Due Process Clause.” *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotations omitted). Yet federal law and 49 States deprive same-sex couples of the fundamental right to marry and exclude gay men and lesbians from the equal protection of the law. Surely a politically powerful group would not find itself a stranger to such a “central part” of the Constitution’s protections.

Simply put—like women, racial minorities, and aliens—gay men and lesbians lack the political power to obtain redress from the political process. See *Snetsinger v. Montana Univ. Sys.*, 104 P.3d 445, 456 (Mont. 2004) (Nelson, J., concurring) (observing that “majoritarian politics relegates gays and lesbians to a position of political powerlessness”); see also *Watkins*, 875 F.2d at 727 (Norris, J., concurring) (“[H]omosexuals as a group cannot protect their right to be free from invidious discrimination by appealing to the political branches.”). Thus, this final

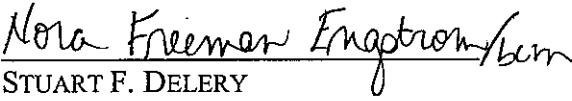
factor, if it is even relevant under this Court's jurisprudence, also counts in favor of deeming gay men and lesbians a suspect class.

CONCLUSION

Maryland Code Ann., Family Law § 2-201 fails strict scrutiny Article 24 of Maryland's Declaration of Rights because it imposes a disability on gay men and lesbians as a result of their sexual orientation and is not narrowly tailored to further a compelling governmental interest. The Circuit Court's order must therefore be *affirmed*.

Respectfully submitted,

Dated: October 19, 2006


STUART F. DELERY
NORA FREEMAN ENGSTROM
Counsel of Record
BENJAMIN C. MIZER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, D.C. 20006
(202) 663-6000

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of October 2006, I caused copies of the foregoing Motion of Counsel Stuart F. Delery for Admission *Pro Hac Vice*; Motion of Counsel Benjamin C. Mizer for Admission *Pro Hac Vice*; Motion of Equality Maryland, Inc., *et al.*, for Leave to File Brief as *Amici Curiae* in Support of Appellees; and Brief of *Amici Curiae* Equality Maryland, Inc., *et al.*, in Support of Appellees to be served by first-class mail, postage prepaid, on:


J. Joseph Curran, Jr., Attorney General
Margaret Ann Nolan, Assistant Attorney General
Steven M. Sullivan, Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202

Robert A. Zarnoch, Assistant Attorney General
Kathryn M. Rowe, Assistant Attorney General
104 Legislative Services Building
90 State Circle
Annapolis, MD 21401

Attorneys for Appellants

Ken Choe
Senior Staff Attorney
American Civil Liberties Union Foundation
Lesbian Gay Bisexual Transgender & AIDS Projects
125 Broad Street, 18th Floor
New York, NY 10004

Attorney for Appellees


Benjamin C. Mizer

