

NO. 15689

IN THE SUPREME COURT OF THE STATE OF HAWAII

NINIA BAHER, GENORA DANCEL, TAMMY
RODRIGUES, ANTOINETTE PREGIL,
PAT LAGON, JOSEPH MELILIO,

Plaintiffs-Appellants,

vs.

JOHN C. LEWIN, in his official
capacity as Director of the
Department of Health, State
of Hawaii,

Defendant-Appellee.

CIVIL NO. 91-1394

APPEAL FROM THE JUDGMENT,
FILED OCTOBER 1, 1991

FIRST CIRCUIT COURT

HONORABLE ROBERT G. KLEIN
Judge

BRIEF OF AMICUS CURIAE LAMBDA LEGAL
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QUESTION PRESENTED

Did the lower court's failure to permit a factual hearing on scientific, psychological, and other pertinent evidence concerning the lives and aspirations of gay people undermine its reasoning regarding the equal right of lesbians and gay men in Hawaii to choose whom to marry?

ARGUMENT

BECAUSE THE LOWER COURT LACKED A SCIENTIFIC, PSYCHOLOGICAL, AND REALISTIC UNDERSTANDING OF THE LIVES AND ASPIRATIONS OF GAY PEOPLE, IT FAILED TO PROTECT THE EQUAL RIGHT OF LESBIANS AND GAY MEN IN HAWAII TO CHOOSE WHOM TO MARRY FREE OF UNWARRANTED GOVERNMENT INTERFERENCE.

The lower court's decision upholding an "opposite-sex requirement" as a constitutionally valid burden on the right to marry failed to protect the fundamental rights of lesbians and gay men in Hawaii. The court gave short shrift to gay people's equal interest in choosing a life partner with whom to enter the institution of marriage, long recognized as a fundamental right. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (law prohibiting interracial marriage struck down despite long social history of defining marriage as intrinsically intraracial); Turner v. Safley, 482 U.S. 78 (1987) (prisoners have right to marry despite inability to partake in all the elements of marriage). Instead, the court recharacterized the right in question as a "right to enter into a homosexual marriage" (Order at 2), thus purporting to evade the long line of cases upholding the intimate and fundamental choice involved in exercising one's right to marry.

The court's equal protection analysis was equally erroneous. The court failed to give heightened scrutiny to the burden imposed on gay people's marital choices. It justified its failure by

ignoring the fundamental nature of the right, and by a host of flawed conclusions regarding the indicia of "suspectness" that bear on discrimination against lesbians and gay men. As a result, the court offered as a "rational" basis for the statute the tautological and inaccurate goal of "promot[ing] the general welfare interests of the community by sanctioning traditional man-woman family units and procreation" (Order at 5-6). Without holding the state to any proof, the lower court thus ruled that in Hawaii, the "general welfare" is somehow not served by protecting all families; procreation is essential to, or the sole purpose for, marriage; and such an unsubstantiated and speculative "general" interest can outweigh the compelling individual rights and needs at stake.

The court's ability to reach the right judgment was undermined by its refusal to conduct a hearing on the facts necessary to determine whether gay people constitute a "suspect class." In the absence of such a hearing, the court's unsubstantiated "findings" regarding the history of discrimination borne by gay people, our political powerlessness as a class, the etiology and "immutability" of sexual orientation, and the reality of how we live must be disregarded by this Court. This amicus brief will present some of the scientific, psychological, and other expert information avoided by the lower court.¹ The neglected information demonstrates that the "opposite sex requirement" burdening gay people's right to choose our life partners, like the analogous racial restriction in

¹ Amicus adopts the legal arguments set forth in appellants' opening brief, and will focus here on summarizing the kinds of expert evidence ignored by the lower court.

Loving,² is unconstitutional.

A. Gay and Non-Gay People Share the Same Fundamental Interest in Choosing a Marital Partner.

In Turner v. Safley, the Supreme Court enumerated four "important attributes of marriage." 482 U.S. at 95-96. Marriage, said the Court, is an "expression[] of emotional support and public commitment," for many "an exercise of religious faith as well as an expression of personal dedication," a relationship usually "formed in the expectation that [it] will be fully consummated," and, often, "a precondition to the receipt of government benefits[,], property rights[,], and other, less tangible benefits[.]" Id. Expert authority confirms that gay people share the same interest in each of these defining characteristics of marriage.³

B. The Lower Court's Refusal to Hear Evidence Underlay Its Failure to Recognize That Anti-Gay Discrimination Warrants Heightened Scrutiny.

1. Gay People Have Suffered a History of Purposeful Discrimination Based on Prejudice and False Stereotypes.

Lesbians and gay men "have historically been subjected to discrimination both pervasive in its scope and intense in its

² "Although Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals." Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (emphasis added); see also Hunter, Marriage, Law, and Gender: A Feminist Inquiry, 1 Law & Sexuality 9, 14-15 (1991).

³ See, e.g., Brief of Amici Curiae American Psychological Ass'n, et al., Kentucky v. Wasson, Kentucky Supreme Court File No. 90-SC-558-TG (pending); Developments in the Law -- Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1608 (1989); Friedman, The Necessity for State Recognition of Same-Sex Marriage, 3 Berkeley Women's L.J. 134 (1988); Lewis, From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 Yale L.J. 1783 (1988).

impact." Jantz v. Muci, 759 F. Supp. 1543, 1549 (D. Kan. 1991).⁴ Moreover, contrary to the lower court's implication (Order at 4), anti-gay prejudice manifests the same social psychological dynamics as racial and other ethnic prejudice.⁵ Indeed, in passing its 1975 resolution declaring that homosexuality is not a disorder, the American Psychological Association noted that the prejudice and stigma to which gay people are subjected are essentially the same as that encountered by other minorities, and is no more justifiable.⁶

The very fact that the Hawaii legislature recently adopted a measure prohibiting employment discrimination based on sexual orientation (Order at 4) indicates that even in Hawaii, "with its history of tolerance" (Id.), there is a genuine problem of anti-gay discrimination. Had the lower court permitted the development of a factual record, it would have had an opportunity to assess the

⁴ See also Sexual Orientation and the Law, 102 Harv. L. Rev. at 1554, 1575 (Gay people are discriminated against in housing, employment, child custody, and are "forced to deny or disguise their identity in order to enjoy rights and benefits routinely accorded heterosexuals"). The prejudice gay people face in society is demonstrated by the fact that we, like Asians, Blacks, and Jews, are often the target of bias-related violence. See Comstock, Violence Against Lesbians and Gay Men (Columbia U. Press 1991).

⁵ See, e.g., Wolfson, Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different, 14 Harv. J. Law and Pub. Pol'y 21 (1991); Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality: Research Implications for Public Policy at 60-80 (hereafter: Homosexuality); Bierly, Prejudice Towards Contemporary Out Groups as a Generalized Attitude, 15 J. of Applied Soc. Psychology 189-199 (1987); K. Gergen & M. Gergen, Social Psychology, 140-141 (1981); Herek, Religious Orientation and Prejudice: A Comparison of Racial and Sexual Attitudes, 13 Personality and Soc. Psychology Bull. 34 (1987); Herek, Can Functions be Measured?, 50 Soc. Psychology Q. 285 (1987).

⁶ Resolution of the Council of Representatives of the American Psychological Association (1975).

experience of gay people in Hawaii and their treatment under law, free of its own preconceptions and biases.

2. Gay People as a Class are Sufficiently Politically Powerless to Warrant the Heightened Protection of the Courts.

"Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.). Other courts considering the issue have noted that anti-gay prejudice itself creates a "structural barrier" which "make[s] effective political participation unlikely, if not impossible." E.g., Watkins v. United States Army, 875 F.2d 699, 727 (9th Cir. 1989) (Norris, J., concurring), cert. denied, 111 S.Ct. 384 (1990); see also Jantz, 759 F. Supp at 1549-51.⁷

Gay people are "vastly underrepresented in this Nation's decision-making councils." See Frontiero v. Richardson, 411 U.S.

⁷ In addition to being a minority group in terms of sheer numbers, lesbians and gay men in Hawaii are further disenfranchised by the "spiral of silence," by which people who believe that they hold unpopular beliefs or status fear isolation and retaliation by the majority or the authorities if they step forward. See Noelle-Neumann, The Spiral of Silence 6-7 (U. of Chicago Press 1984). Cultural factors in Hawaii's particular ethnic mosaic may further prevent assertion of a gay political identity. Had the lower court taken evidence, it would have learned the obvious: in Hawaii as in the country generally, gay people are an outnumbered, dispersed minority; gay people are despised and stigmatized; gay people are the object of violence; non-gay people are frequently reluctant to associate themselves with the cause of equal rights for gay people; gay people are deprived of the normal prerequisites of group formation and effective political action; gay people have been the victims of invidious, inaccurate, and destructive stereotypes; the non-gay majority is unwilling and often unable to empathize with gay people, to put themselves in our shoes; and, finally, exclusion from basic social institutions like marriage wreaks great harm on us, undermining our relationships and branding us as inferior.

677, 686 n.17 (1973). This is true in Hawaii as well. Amicus is aware of no openly gay state official, legislator, or judge; lesbian and gay men in Hawaii are certainly not represented in the political process in proportion to our numbers or needs.

3. Sexual Orientation is Highly Resistant to Change. Thus, Stigma or Discrimination Based on Sexual Orientation Fully Warrants Heightened Scrutiny.

The lower court erred in its assumption (Order at 5) that a showing of literal "immutability" is essential to defining a suspect classification. In Lyng v. Castillo, 477 U.S. 635 (1986), the U.S. Supreme Court framed the inquiry for federal purposes as whether the class of people in question "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group." Id. at 639 (emphasis added). In addition, the degree to which an individual controls his or her acquisition of a trait, and the relative ease or difficulty with which a trait can be changed, may determine whether a classification is constitutionally suspect. See, e.g., Mathews v. Lucas, 427 U.S. 495, 505 (1976).

Lesbians and gay men qualify for heightened scrutiny, both because in this society our sexual orientation is a "distinguishing characteristic" (see Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Sexual Identity, 36 UCLA L. Rev. 915, 924-32 (1989)), and because one's sexual orientation is not easily susceptible to change.

Expert evidence overwhelmingly demonstrates that sexual orientation is acquired at an early age. Thus it makes little sense to argue that the trait is voluntarily acquired. For some,

adult homosexual orientation is predictable by early childhood.⁸ There may be biological as well as socio-environmental factors that contribute to one's sexual orientation within the range of human diversity; these factors may differ substantially within the population.⁹

Research indicates that for most people, homosexual feelings have already developed by early adolescence.¹⁰ "By the time boys and girls reach adolescence, their sexual preference is likely to be already determined, even though they may not yet have become sexually very active."¹¹ Feelings underlying sexual orientation appear during childhood and adolescence without prior sexual experience.¹²

⁸ See, e.g., Green, The Immutability of (homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis, 16 J. Psychiatry & Law 537 (1988); R. Green, The "Sissy Boy Syndrome" and the Development of Homosexuality 370 (1987).

⁹ See A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference: Its Development in Men and Women 183-186 (1981) (hereafter: Sexual Preference); Ellis & Ames, Neurohormonal Functioning and Sexual Orientation: A Theory of Homosexuality-Heterosexuality, 101 Psychological Bull. 233 (1987); Money, Sex, Sickness, or Status? Homosexual Gender Identity and Psycho-neuroendocrinology, 42 Am. Psychologist 384 (1987); Storms, A Theory of Erotic Orientation Development, 88 Psychological Rev. 340 (1981). Although some researchers have postulated that homosexual orientation may result from a different hormonal or physiological constitution, a series of studies has failed to establish that gay people are characterized by abnormal hormone levels or other abnormal characteristics. See Rickets, Biological Research on Homosexuality: Ansell's Cow or Occam's Razor? 9 J. Homosexuality 65 (1984); Meyer-Bahlberg, Homosexual Orientation in Women and Men: A Hormonal Basis, in The Psychobiology of Sex Differences and Sex Roles 105-130 (Parsons ed. 1980).

¹⁰ Sexual Preference, supra n.9, at 186-187.

¹¹ Id. at 186.

¹² Sexual Preference, supra n. 9, at 186-192.

Once established, homosexual orientation is highly resistant to change. Researchers generally agree that, at a minimum, the majority of gay people are unable to change their sexual orientation, even if they wished to do so. Although some therapists have reported that their clients have changed their sexual orientation in treatment (from homosexual to heterosexual), closer scrutiny has shown that such changes were more likely to occur among bisexuals who were highly motivated to adopt a heterosexual behavior pattern. Many interventions aimed at changing sexual orientation have succeeded only in reducing or eliminating homosexual behavior rather than in creating or increasing heterosexual attractions.¹³ Furthermore, it is ethically questionable, from the point of view of a practitioner, to seek to alter through therapy a trait that is not a disorder¹⁴

¹³ Haldeman, Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination, in Homosexuality, supra n.5, at 149-160; A. Martin, Innovations in Psychotherapy with Homosexuals 24-57 (1984). In January 1990, Dr. Bryant Welch, Executive Director for Professional Practice of the APA, stated that "no scientific evidence exists to support the effectiveness of any of the conversion therapies that try to change one's sexual orientation." "[R]esearch findings," he explained, "suggest that efforts to 'repair' homosexuals are nothing more than social prejudice garbed in psychological accouterments." Statement of Bryant L. Welch, J.D., Ph.D., American Psychological Association, January 26, 1990.

¹⁴ The mental health profession does not consider homosexual orientation to be a disorder. Nearly twenty years ago, the American Psychiatric Association removed homosexuality from its list of mental disorders. In so doing, the organization stated that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities." Thus, "[i]n the reasoned judgment of most American psychiatrists today, homosexuality per se does not constitute any form of mental disease." Resolution of the American Psychiatric Association, December 15, 1973. Extensive psychological research conducted over almost three decades has conclusively established that "homosexuality in and of itself bears no necessary relationship to psychological adjustment."

and is extremely important to individual identity.¹⁵

Unlike the lower court here, other judges have addressed the "immutability" issue with due constitutional weight:

Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation. Would heterosexuals living in a city that passed an ordinance burdening those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex? It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment. But the possibility of such a difficult and traumatic change does not make sexual orientation "mutable" for equal protection purposes. To express the same idea under the alternative formulation, I conclude that allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.

875 F.2d at 726 (citations omitted) (emphasis added).

¹⁵ See Davidson, Constructionism and Morality in Therapy for Homosexuality, in Homosexuality, supra n.5, at 137-148; Silverstein, Psychological and Medical Treatments of Homosexuality, in Homosexuality, supra n.5, at 101-114; Malyon, Psychotherapeutic Implications of Internalized Homophobia in Gay Men in Homosexuality and Psychotherapy: A Practitioner's Handbook of Affirmative Models 59 (J. Gonsiorek ed. 1982). Indeed, because psychologists generally agree that psychological adjustment is positively correlated with acceptance and integration of one's sexual orientation, and maladjustment is positively correlated with nonacceptance of sexual orientation, many clinicians also believe that "change-of-orientation therapy programs are ethically improper and should be eliminated." See Davidson, supra, at 148.

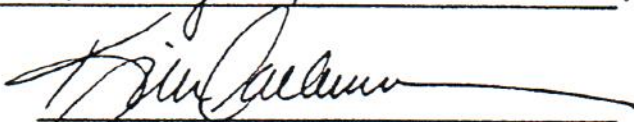
CONCLUSION

The lower court refused to consider important evidence bearing on the lives of lesbians and gay men in Hawaii and the claim for heightened scrutiny. It further failed to hold the state to its burden of proving the rationality of its "opposite sex requirement," which destroys the right of gay people to marry. Because of the importance of marriage in American society, this Court should hold that the constitutional right to privacy protects both gay and non-gay adults' choice of a marital partner, and that the right to equal protection prohibits the government from restricting that choice for the class of gay citizens.

At the very least, this Court should reverse and remand to the lower court for heightened scrutiny, both because marriage is a fundamental right, and because gay people constitute a "suspect class." The lower court should then require the state to prove a compelling state interest in barring gay people in Hawaii from marriage.

DATED: Honolulu, Hawaii

February 28, 1992



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)	
JOHN C. LEWIN, in his official)	HONORABLE ROBERT G. KLEIN
capacity as Director of the)	Judge
Department of Health, State)	
of Hawaii,)	
)	
Defendant-Appellee.)	

CERTIFICATE OF SERVICE

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