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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MARY LI and REBECCA KENNEDY; STEPHEN
KNOX, M.D., and ERIC WARSHAW, M.D.;
KELLY BURKE and DOLORES DOYLE; DONNA
POTTER and PAMELA MOEN; DOMINICK
VETRI and DOUGLAS DEWITT; SALLY
SHEKLOW and ENID LEFTON; IRENE
FARRERA and NINA KORICAN; WALTER
FRANKEL and CURTIS KIEFER; JULIE
WILLIAMS and COLEEN BELISLE; BASIC
RIGHTS OREGON; and AMERICAN CIVIL
LIBERTIES UNION OF OREGON,

Plaintiffs,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff,

vs.

STATE OF OREGON; THEODORE
KULONGOSKI, in his official capacity as Governor
of the State of Oregon, HARDY MYERS, in his
official capacity as Attorney General of the State of
Oregon; GARY WEEKS, in his official capacity as
Director of the Department of Human Services of
the State of Oregon; and JENNIFER
WOODWARD, in her official capacity as State
Registrar of the State of Oregon,

Defendants,

vs.

DEFENSE OF MARRIAGE COALITION, CECIL
MICHAEL THOMAS, NANCY JO THOMAS,
DAN MATES, and DICK OSBORNE,

Intervenors-Defendants.

Case No. 0403-03057

BRIEF AMICUS CURIAE
OF FAMILY RESEARCH
COUNCIL IN SUPPORT OF
INTERVENORS-DEFENDANTS

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1 **I. INTEREST OF AMICUS CURIAE**

2 Family Research Council (FRC) is a non-profit, research and educational
3 organization dedicated to articulating and advancing a family-centered philosophy of public
4 life. FRC is a voice for the family in Washington, D.C., and provides policy analysis,
5 legislative assistance, research and analysis for the legislative, executive, and judicial
6 branches of the federal and state governments. FRC also works to inform the news media,
7 the academic community, business leaders, and the general public about family issues that
8 affect the nation.

9 FRC’s research, publications, and films have been distributed to over 400,000
10 scholars, students, organizations, and citizens. Its legal and public policy experts are
11 continually sought out by members of Congress and State legislators for assistance and
12 advice on the unique relationship between parents and their children. FRC has participated
13 as amicus curiae in numerous cases before the United States Supreme Court and other federal
14 and state courts.

15 **II. ARGUMENT**

16 **A. INTRODUCTION**

17 It is an irony of Plaintiffs’ complaint filed with this Court that the document
18 commences its presentation with a confident definition of the structure of marriage, clearly
19 limiting it to two individuals. To the extent that Plaintiffs insist on the importance to
20 marriage of the preservation of this characteristic, or concede the ontological significance to
21 marriage of that (or any) trait, the Plaintiffs in theory are conceding that marriage, to be
22 marriage, must maintain a particular structure. Yet the arguments they submit in this case in
23 favor of the redefining of marriage take no cognizance whatever of the notion that marriage
24 is not amenable to random reconfiguring, and certainly do not countenance that there is a
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1 legitimate justification for its enduring structure. In this Plaintiffs are decidedly wrong.
2 Indeed, their arguments falter on nearly every point on which analysis can be engaged: from
3 the aptitude of the state constitutional provision chosen to address their complaint, to the
4 operation of the analysis that governs their claim even as it is mistakenly postured.

5
6 It is, however, the intention of this limited presentation to focus attention on the
7 restricted matter of the Court of Appeals case of Tanner v. Oregon Health Sciences
8 University and its relationship to the claim that Plaintiffs now bring. That case contains an
9 analysis, troubled as it is, on which much of Plaintiffs' hope improvidently rests. The close
10 connection between Plaintiffs' claims and the suggestions of Tanner make the content of that
11 case of particular interest, and worthy of examination.

12
13 **B. THE COURT OF APPEALS DECISION IN TANNER IS AN ANOMALY OF DUBIOUS
MERIT AND PLAINTIFFS' RELIANCE THEREON IS MISPLACED.**

14 In Tanner v. Oregon Health Sciences University, 157 Or App 502, 520, 971 P2d 435
15 (1998), the Court of Appeals describes the State's Privileges and Immunities Clause
16 jurisprudence less than charitably, as incomplete and incoherent. The accuracy of that
17 description is open to some doubt, thereby leaving one to wonder as to the Tanner court's
18 intention in that bold announcement. Reading through to the end of the opinion, however,
19 the suspicion is not much allayed that the court's introductory description may have been
20 intended to diminish the reader's expectation of coherence in that very case opinion. In light
21 of the rather unleashed and voluntaristic conclusions of Tanner, perhaps the court determined
22 its presentation would be easier to digest with an early warning that theoretical integrity is
23 not the defining characteristic one should expect in a Privileges and Immunities Clause
24 opinion. Or perhaps it was suggested so as to justify the creative nonconformity exemplified
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1 by the court in designing its conclusions.

2 The Tanner decision is an anomaly, and should be viewed with the caution properly
3 reserved for a case from a court that suggests that the standards guiding its pursuit are
4 somewhat incapable, and then demonstrates a similar characteristic in its own presentation.
5 The presumption displayed in the opinion is seen not only in the court’s ultimate conclusion,
6 but also in its handling of the components ostensibly leading it to reach that conclusion.
7

8 Before expounding some of that critical analysis, however, it should be mentioned
9 that the Tanner decision, for all its demerits, is to be favorably distinguished in certain
10 respects from Plaintiffs’ claims in the case sub judice (which of course rests many of its
11 premises on the authority of Tanner). Not only does Tanner leave the issue of homosexual
12 “marriage” alone, the successful plaintiffs in that case took, as a procedural matter, a
13 defensible approach to the case in light of its Privileges and Immunities Clause claim.
14 Plaintiffs herein do not. That particular distinction (expounded below) demonstrates how
15 Tanner’s aberrant authority, whatever its value, is not properly applicable to Plaintiffs’ case
16 herein.
17

18 **1. THE DESIGN OF PLAINTIFFS’ CLAIM DEMONSTRATES A**
19 **MISAPPREHENSION OF THE NATURE OF THE CONSTITUTIONAL**
20 **PROVISION UPON WHICH PLAINTIFFS PURPORT TO RELY.**

21 Plaintiffs are without a constitutional remedy in Oregon for their dissatisfaction with
22 the State’s accommodation of our civilization’s consensus on the design of marriage, as
23 reflected in ORS 106.010, et seq. The historic definition and design of the marriage contract
24 is certainly not subject to condemnation under Article 1, Section 20 of the Oregon
25 Constitution, which provision only forbids certain restricted grants of favorable privileges
26 and immunities (neither of which categories are contained in the law defining the boundaries

1 of marriage participation). Other pieces of legislation in Oregon certainly do grant certain
2 benefits to individuals who are married (thus relying on the status of married individuals),
3 but these benefits are not what Plaintiffs challenge in their lawsuit. This marked structural
4 deficiency not only dooms Plaintiffs’ Privileges and Immunities claim, but also unmasks
5 their intentions. The benefits accorded those who are married is not their main objective, but
6 rather the status and “social validation”¹ that attends to those who may be identified as
7 “married.” Plaintiffs’ attenuated “benefits” discussion is used only in a misguided attempt to
8 shoehorn their marriage status attack into a privileges and immunities issue; it is at once a
9 tactic to preserve surface plausibility to Plaintiffs’ constitutional claim, as well as a glaring
10 indicator of their defective effort. This defect is made evident when contrasting the Tanner
11 plaintiffs’ challenge to that of Plaintiffs herein.
12

13
14 In Tanner, the plaintiff challenged, on the basis of Article 1, Section 20 of the Oregon
15 Constitution, OSU’s policy which granted insurance benefits to spouses of married
16 employees, but did not allow such benefits to unmarried domestic partners (including same-
17 sex domestic partners). Tanner, 157 Or App at 519, 525. The plaintiffs in Tanner sought to
18 have the benefit that was given to spouses also given to domestic partners (i.e., insurance
19 benefits), and challenged the policy that restricted this benefit to spouses.
20

21 Here, Plaintiffs generally allege they desire benefits given to those who are spouses,
22 but by contrast, they do not seek to have those benefits extended (like in Tanner) to those
23 who are similarly situated non-spouses. Rather, they seek to have this Court announce that
24 Plaintiffs must be allowed to turn themselves into “spouses” so as to obtain the benefits
25

26 ¹ PLAINTIFFS’ FIRST AMENDED COMPLAINT, at ¶ 5.

1 | accorded those in that category. This is nothing like what Tanner accomplished or
2 | authorizes, and Plaintiffs’ appeal to that case for authority for their petition, which is clearly
3 | distinct from that presented in Tanner, is quite mistaken.²

4 | There is an additional crucial distinction between the Tanner plaintiffs and Plaintiffs
5 | here. The Tanner plaintiffs specifically identified both the policy and the benefit the policy
6 | extended which plaintiffs saw as unconstitutionally restricted in its availability. Plaintiffs
7 | herein, by contrast, only vaguely mention in passing the existence of an undetermined
8 | number of unspecified benefits granted spouses by unspecified legal sources, but neither
9 | identify nor challenge any of these laws which grant such benefits to spouses alone.

11 | Because the law Plaintiffs challenge herein (which defines the parameters of the civil
12 | marriage contract) does not grant any privileges or immunities, and because any other laws
13 | which may grant privileges and immunities to individuals based on marital status are not
14 | challenged as unconstitutionally underinclusive, Plaintiffs’ structural configuration of their
15 | legal challenge has guaranteed its failure. This is the inevitable result of Plaintiffs’
16 | misguided lawsuit, which seeks to make use of a constitutional provision in a manner its
17 | nature and authority will not allow. Plaintiffs want to redefine the civil contract of marriage.
18 | In such an effort, Article 1, Section 20 of the Oregon Constitution has no utility.

24 | _____
25 | ² Because of the continual announcements by homosexual rights activists of their self-perception as
26 | inheritors of the mantle of the civil rights movement, imagine if the black civil rights movement had
proceeded similarly to how Plaintiffs do now: by demanding that the courts redefine what it means to
be white, so that blacks could be considered by law as white, and enjoy all the privileges and
immunities that come from that white status.

1 2. **THE TANNER COURT’S PIONEERING SUSPECT CLASS ANALYSIS IS**
2 **INFORMED BY DELIBERATE DISREGARD FOR GOVERNING STANDARDS,**
3 **NOT A LEGITIMATE LEGAL CONSTRUCTION, AND PLAINTIFFS’**
4 **RELIANCE ON ITS AUTHORITY IS UNFOUNDED.**

5 The Court in Tanner announced its recognition of the analysis required in a Privileges
6 and Immunities Clause challenge which necessitates a “true class” finding before the
7 challenged law may be given critical attention, and a finding that a true class is “suspect”
8 before a heightened scrutiny is applied. Tanner, at 520-21. Though acknowledging these
9 standards, the Tanner court departed from the governing rules and designed its own course.
10 It discussed the distinction between ordinary and “suspect” true classes, acknowledging
11 momentarily that the Supreme Court’s decision in Hewitt v. State Accident Insurance Fund
12 Corp., 294 Or 33, 653 P2d 970 (1982), is the lead governing opinion on the matter, and that
13 Hewitt had assigned significance to the issue of “immutability” of a trait when assigning
14 suspect class status to those individuals in possession of the trait. Id. at 522. But the Tanner
15 court then strove to defend the position that immutability is not necessary after all in
16 identifying a suspect class. This it implausibly accomplished through referencing irrelevant
17 dicta from several cases, supplemented by a related and unfounded thesis.

18 Dictum from Greist v. Phillips, 322 Or 281, 300, 906 P2d 789 (1995), was identified
19 by the Tanner court as suggesting alienage, along with race and sex, is a suspect
20 classification. (That dicta notwithstanding, the Court has never held alienage to be a suspect
21 classification. (That dicta notwithstanding, the Court has never held alienage to be a suspect
22 class, nor is it clear at all what aspect of alienage is particularly in mind in this passing
23 reference.³) The Tanner court additionally made appeal to two other cases, State v.

24 _____
25 ³ The United States Supreme Court in Plyler v. Doe, 457 US 202 (1982) seems to present a quasi-
26 immutable view of alienage in certain circumstances. Minor children of aliens “can effect neither
 their parents’ conduct nor their own status,” id. at 220, so are accorded a different level of treatment
 by the law than those able to affect their status. Moreover, homosexuality has been contrasted to

1 Buchholz, 309 Or 442, 788 P2d 998 (1990), and Salem College & Academy, Inc. v. Emp.
2 Div., 298 Or 471, 695 P2d 25 (1985). Neither case lends assistance to the court’s opposition
3 to the Supreme Court’s requirement of immutability for suspect class status.

4 Buchholz in dictum referenced the fact that religion would be an “impermissible
5 criteria” upon which a prosecutor may determine whether a defendant merits a plea bargain
6 (although the defendant in that case made no such claim), Buchholz, 309 Or at 446, but
7 nowhere does that case suggest that religion constitutes a suspect class, or that immutability
8 is not a prerequisite to suspect class status. The religious affiliation (or rather “church
9 affiliation”) spoken of by the court in Salem College not only was *not* identified as a suspect
10 class, its use in that case shows the Tanner court to be guilty of equivocation in even citing to
11 Salem College. See Salem College, 298 Or at 490. The Tanner court as additional authority
12 included a footnote referencing Sealey v. Hicks, 309 Or 387, 398, n.12 (1990), the content of
13 which makes no assertion whatsoever on the issue of immutability and suspect classes, and
14 thus (like the other cases) is completely incapable of justifying the court’s anti-immutability
15 position. None of the cases cited by the Tanner court serve to remove the Hewitt court’s
16 holding (discussed at further length, infra) assigning immutability as a requisite to suspect
17 class status.⁴

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alienage by at least one court. See High Tech Gays v. Secretary of Defense, 895 F2d 563, 573 (9th
Cir. 1990).

23 ⁴ Topping off its discussion, the court in Tanner then seeks to bolster its anti-immutability proposal by
24 making the incredible suggestion that additional doubt as to the “immutability” requirement for
25 suspect classes is supported by the assertion that “modern medical technology” indeed makes *gender*
26 changeable at will. That statement by the court begs the question so appreciably and demonstrates
such an abject unfamiliarity with that issue, as to be mildly astounding. To its credit, though, the
Tanner court restrained itself from citing to the wonders of medical technology, or the example of
Michael Jackson, to show that race, also, is not immutable.

1 The court’s review of the irrelevant cases and considerations to which it made
2 reference was the backdrop to the following non sequitur:

3 We therefore understand from the cases that the focus of suspect class
4 definition is not necessarily the immutability of the common, class-defining
5 characteristics, but instead the fact that such characteristics are historically
6 regarded as defining distinct, socially-recognized groups that have been the
subject of adverse social or political stereotyping or prejudice. If a law or
government action fails to offer privileges and immunities to members of such
a class on equal terms, the law or action is inherently suspect[.]

7 Id. at 523. That conclusion is a voluntaristic stipulation, not a legitimate inference from the
8 law surveyed. However, having liberated itself from the legal restraint imposed by the
9 Supreme Court’s immutability requisite, the court then went on to find not only that
10 homosexuals comprise a suspect class, but that so also do homosexual *couples*. That trick,
11 which Plaintiffs herein seek to have reproduced, is discussed next.
12

13 **3. THE PROPOSAL EXTENDED BY PLAINTIFFS, AND FOUND IN TANNER,
14 THAT “HOMOSEXUAL COUPLES” COMPRISE A SUSPECT CLASS IS AN
15 ARBITRARY DEPARTURE FROM THE STRICTURES OF LOGIC AND THE
CONSTITUTIONAL PROVISIONS AT ISSUE IN THE CASE.**

16 The Tanner court announced, and Plaintiffs herein now submit, that unmarried
17 homosexual *couples* are a true class. However, this conclusion as it is asserted in Tanner is
18 not only counterintuitive, but is not in the least obtained from the discussion of the court
19 preceding its announcement. Instead it is the fiat product generated by the absence of
20 functional alternatives to accomplishing the desired end. For the Tanner court, as well as the
21 Plaintiffs herein, this “class” was invented for the reason that no other design could serve to
22 accomplish the result being sought.
23

24 As *individuals*, or as a class comprised of individuals, it is evident that the marriage
25 right as set forth in ORS 106.010 is not being denied to Plaintiffs. Without exception, all
26 those adults who comprise the ostensive class “homosexual” are permitted to marry. As a

1 consequence of this truth, the sleight-of-hand which seeks to identify the relevant class as
2 comprised of “couples” is introduced. On this rendition, “couples” are not permitted to
3 marry. Essentially what is complained is that marriage is not defined to include same-sex
4 relationships. This, however, is *very* different from asserting that homosexuals are not
5 permitted to marry. (They clearly are.) This distinction illuminates the error of the Tanner
6 court (whose conclusions Plaintiffs seek to appropriate here) in its analysis of the class it
7 identifies.
8

9 In Tanner, the court leaps from its finding of a suspect class of “homosexuals” to
10 asserting a suspect class of homosexual (same-sex) “couples,” as if these were somehow
11 fungible categories. Tanner, 157 Or App at 523-24. Clearly they are not, and this is at the
12 very least evident for the reason that the result obtained in Tanner would not have been
13 achieved if the class had been defined as comprised of “homosexuals” as opposed to
14 “homosexual couples.” Precisely the same point exists in the case before this Court: if a
15 suspect class of “homosexuals” is posited, these class members are not in any fashion denied
16 access to marriage. Which is why Plaintiffs are compelled to design their claim as one in
17 favor of the “class” of same-sex couples.
18

19 But couples do not have rights, nor are couples denied any rights—at least as
20 “couples” is understood when asserted by Tanner and by Plaintiffs herein, as a *relationship*.
21 What plaintiffs propose (in conformity with Tanner) is that a *relationship* should be made a
22 suspect “class,” in order to afford not *individuals*, but the *relationship* a heretofore
23 unrecognized (not benefit, but) *status*. Such an undertaking could not be further from the
24 legitimate application of the constitutional provision which is alleged to justify it. That
25 manner of use of constitutional class nomenclature to cloak the operation of what is clearly
26

1 not the function of the constitutional provision that requires use of such nomenclature is as
2 clever as it is insidious. “Class” here becomes the veil under which the re-manufacture of
3 marital status is to be accomplished, though no “privilege or immunity” is at all involved in
4 the legal status which Plaintiffs offer be transmuted through this process.

5
6 **B. IMMUTABILITY IS A PREREQUISITE TO A CHARACTERISTIC WHICH DEFINES A
7 SUSPECT CLASS, AND HOMOSEXUALITY IS NEITHER IMMUTABLE NOR
8 COMPRISES A SUSPECT CLASS.**

9 Oregon jurisprudence does not follow federal equal protection jurisprudence in its
10 entirety, but does mirror “that part of the analysis which asks whether the classification is
11 made on the basis of a suspect class such as race or sex and, if so, holding that such a
12 classification is subject to a strict scrutiny.” Hewitt, supra, 294 Or at 43, citing Olsen v. State
13 ex rel. Johnson, 276 Or 9, 19 n.8, 554 P2d 139 (1976). In discussing what factors allow a
14 class to be categorized as “suspect,” the Supreme Court in Hewitt explained that “we agree
15 that a classification is ‘suspect’ when it focuses on ‘immutable’ personal characteristics.” Id.
16 at 45. The court went on: “It can be suspected of reflecting ‘invidious’ social or political
17 premises, that is to say, prejudice or stereotyped prejudgments. Historically, the most
18 obvious such classification, and the one recognized to be such within the special concerns
19 that gave rise to the fourteenth amendment, was, of course, racial discrimination.” Id. at 45-
20 46.

21 In keeping with the immutability requirement for suspect class categorization, the
22 Court made application of that standard to gender, finding that “[g]ender is a visible
23 characteristic determined by causes not within the control of the individual.” Id. at 46.
24 “Accordingly,” the Court held, “when classifications are made on the basis of gender, they
25 are, like racial, alienage and nationality classifications, inherently suspect.” Id. This
26

1 reasoning and conclusion is very similar to that which is found in the case of Frontiero v.
2 Richardson, 411 US 677 (1973), in which the United States Supreme Court plurality
3 determined sex to be a suspect class because of the crucial similarity that it shares with race
4 and national origin: immutability, and determination by birth. In Frontiero, the plurality
5 explained:

7 [S]ince sex, like race and national origin, is an *immutable characteristic*
8 *determined solely by the accident of birth*, the imposition of special
9 disabilities upon the members of a particular sex because of their sex would
10 seem to violate ‘the basic concept of our system that legal burdens should bear
11 some relationship to individual responsibility...’ Weber v. Aetna Casualty &
12 Surety Co., 406 US 164, 175 (1972).

13 Frontiero at 686 (emphasis added).

14 The logic of the Oregon Supreme Court’s standard requiring immutability of those
15 classes deemed “suspect” is validated by the nature of the judicial treatment of such classes
16 (which serves to closely scrutinize any law which disadvantages the class). This heightened
17 protection is reserved for those classes which are classified by factors beyond the control or
18 regulation of the individual class members, thereby honoring the “basic concept of our
19 system that legal burdens should bear some relationship to individual responsibility or
20 wrongdoing.” Plyler v. Doe, 457 US at 220, quoting Weber, 406 US at 175. This policy
21 justifies and explains the connection between an immutable status and a strict measure of
22 scrutiny when that status is negatively implicated by a law.

23 Dispensing with both governing precedent and policy considerations, the Tanner
24 court suggests that groups should be identified for heightened protection based on the mere
25 existence of social opprobrium directed to them for behaviors that are indeed subject to moral
26 agency. Tanner, 157 Or App at 523. Not only does Tanner’s new method allow behavior-
based considerations to define a suspect class (thereby severing the connection between strict

1 scrutiny and personal blamelessness), this classification requires no evaluation of whether
2 there exists a justification for that opprobrium (which omission can lead to potentially serious
3 mischief if not amended). Moreover, when the Tanner court suggests that suspect status
4 should attach to *relationships* chosen by individuals classified by their behavioral choices,
5 this result is so far divorced from the justification for the operation of that heightened
6 protection as to be bewildering.

8 The Tanner decision, being the aberration it is, stands ineffective in altering the
9 immutability requirement for heightened scrutiny that the Oregon Supreme Court has
10 established for this realm of the law. “Homosexuality” is not an immutable characteristic,
11 nor therefore a definer of a suspect class. This recognition is reflected in the absence from
12 federal and state law of a recognition of homosexuality or sexual orientation as the basis for
13 immutability or suspect class categorization. See Woodward v. United States, 871 F2d 1068,
14 1076 (Fed. Cir. 1989), cert. denied, 494 US 1003 (1990) (homosexuality is primarily
15 behavioral in nature and as such is not immutable); Baker v. Wade, 769 F2d 289, 292 (5th
16 Cir. 1985) (en banc), cert. denied, 478 US 1022 (1986) (homosexuals compose neither a
17 suspect nor a quasi-suspect class); National Gay Task Force v. Board of Education of
18 Oklahoma City, 729 F2d 1270, 1273 (10th Cir. 1984), aff’d mem. by an equally divided
19 Court, 470 US 903 (1985) (legal classification of gays is not suspect); Rich v. Secretary of
20 Army, 735 F2d 1220, 1229 (10th Cir. 1984) (“A classification based on one’s choice of
21 sexual partners is not suspect.”); see also Hatheway v. Secretary of Army, 641 F2d 1376,
22 1382 (9th Cir. 1981), cert. denied, 454 US 864 (1981); DeSantis v. Pacific Telephone &
23 Telegraph Co., 608 F2d 327 (9th Cir. 1979); Holmes v. California Army Nat’l Guard, 124
24 F3d 1126, 1132 (1997) (“Because homosexuals do not constitute a suspect or quasi-suspect
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1 class, we subject the military’s ‘don’t ask/don’t tell’ policy to rational basis review.”);
2 Department of Health & Rehabilitative Servs. v. Cox, 627 So2d 1210, 1219 (Fla. App. 1994)
3 (“We have located no Florida appellate precedent adopting a strict scrutiny review. ... In the
4 federal courts, neither homosexual orientation nor homosexual conduct has been determined
5 to be a class requiring strict scrutiny review”); Opinions of the Justices to the Senate, 440
6 Mass 1201, 1206 n.3, 802 NE2d 565 (2004) (court has not recognized sexual orientation as a
7 suspect classification); Rutgers Council of AAUP Chapters v. Rutgers State Univ., 298 NJ
8 Super 442, 453, 689 A2d 828 (NJ App. 1997) (“We have not created suspect classifications
9 where the federal courts have refused to do so, and therefore, have no reason to view sexual
10 orientation or marital status as deserving of heightened scrutiny.”)

11
12 The justifications found in the cases across the country for this exclusion of sexual
13 orientation or preference from suspect classification or immutability consideration are
14 numerous, and cover a broad range of considerations. A few examples will suffice. The
15 Ninth Circuit Court of Appeals explained in High Tech Gays, *supra*, 895 F2d at 573-74, the
16 following:

17
18 To be a “suspect” or “quasi-suspect” class, homosexuals must 1) have
19 suffered a history of discrimination; 2) exhibit obvious, immutable, or
20 distinguishing characteristics that define them as a discrete group; and 3)
21 show that they are a minority or politically powerless, or alternatively show
22 that the statutory classification at issue burdens a fundamental right. Bowen v.
23 Gilliard, 483 U.S. 587, 602-03, 97 L. Ed. 2d 485, 107 S. Ct. 3008 (1987) (due
24 to a lack of these characteristics, the statutory classifications of the Federal
25 Aid to Families with Dependent Children Program were subject to only a
26 rational basis review) (citing Lyng v. Castillo, 477 U.S. 635, 638, 91 L. Ed. 2d
527, 106 S. Ct. 2727 (1986) (due to a lack of these characteristics, the
statutory classifications of the Federal Food Stamp Program were subject to
only a rational basis review)).

While we do agree that homosexuals have suffered a history of discrimination,
we do not believe that they meet the other criteria. *Homosexuality is not an
immutable characteristic; it is behavioral and hence is fundamentally
different from traits such as race, gender, or alienage*, which define already

1 existing suspect and quasi-suspect classes. Accord Woodward, 871 F.2d at
2 1076. The behavior or conduct of such already recognized classes is irrelevant
to their identification. Id.

3 (Emphasis added.)

4 Also, from Steffan v. Cheney, 780 F Supp. 1, 6-7 (D.C. 1991), we read:

5 No choice in the matter [of sexual orientation] would argue for a conclusion
6 of immutability, while some choice or a great deal of choice would tend to
7 support a finding of mutability. Without a definitive answer at hand, yet
8 confident that some people exercise some choice in their own sexual
orientation, the Court does not regard homosexuality as being an immutable
characteristic.

9 On the matter of suspect classifications, the Supreme Court seems to focus on
10 the question of whether an individual chooses the characteristic that defines
11 the class or not. Plyler v. Doe, 457 US 202, 220 (1982); Cleburne, 473 U.S. at
12 441 (quoting Mathews v. Lucas, 427 US 495, 505 (1976)). One's race is
determined genetically, and one's gender is—unless there is new evidence
worthy of a Nobel prize—commonly believed to be a random event.
Frontiero v. Richardson, 411 US 677, 686, (1973) (plurality opinion). * * *

13 It is not for this Court to say definitively whether sexual orientation is always
14 chosen by the individual, but it is apparent that sometimes it is chosen. This
15 realization puts sexual orientation closer to the category of alien adults who
are not a suspect class under Plyler, than to their children who did not choose
their status.

16 The Sixth Circuit Court of Appeals in Equality Foundation v. City of Cincinnati, 54
17 F3d 261, 267 (1995), explained that even if sexual “orientation” were assumed to be an
18 immutable characteristic, there still remains a problem that disallows the legal recognition of
19 a class based on such a characteristic:

20 Assuming *arguendo* the truth of the scientific theory that sexual orientation is
21 a “characteristic beyond the control of the individual” as found by the trial
22 court, see id. at 437, the reality remains that no law can successfully be
23 drafted that is calculated to burden or penalize, or to benefit or protect, an
24 unidentifiable group or class of individuals whose identity is defined by
25 subjective and unapparent characteristics such as innate desires, drives, and
26 thoughts. Those persons having a homosexual “orientation” simply do not, as
such, comprise an identifiable class. Many homosexuals successfully conceal
their orientation. Because homosexuals generally are not identifiable “on
sight” unless they elect to be so identifiable by conduct (such as public
displays of homosexual affection or self-proclamation of homosexual
tendencies), they cannot constitute a suspect class or a quasi-suspect class
because “they do not [necessarily] exhibit obvious, immutable, or

1 distinguishing characteristics that define them as a discrete group[.]” Bowen
2 v. Gilliard, 483 US 587, 602 (1987).

3 The Tanner decision stands alone in the face of an opposing unanimous gathering of
4 witnesses. Homosexuality and sexual orientation are not judicially recognized in this
5 country, in federal or state courts, as constituting an immutable or suspect classification. Not
6 only is Tanner wholly out of step with a national host of authority, it also fails in Oregon
7 under the clear terms of the Supreme Court’s Hewitt decision, notwithstanding its awkward
8 best efforts to wriggle free of the control of that decision.

9 **III. CONCLUSION**

10 For the foregoing reasons, this Court should reject Plaintiffs’ efforts to abolish the
11 unique structure of marriage as the union of one man and one woman.

12 Respectfully submitted this _____ day of April, 2004.

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I hereby certify that I have made service of the foregoing BRIEF AMICUS CURIAE OF FAMILY RESEARCH COUNCIL IN SUPPORT OF INTERVENORS-DEFENDANTS on the parties listed below in the manner indicated:

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