

IN THE SUPREME COURT OF THE STATE OF VERMONT

STAN BAKER and PETER HARRIGAN,
Appellants

v.

STATE OF VERMONT and TOWN OF SHELBURNE
Appellees

NINA BECK and STACY JOLLES,
Appellants

v.

STATE OF VERMONT and CITY OF SOUTH BURLINGTON
Appellees

LOIS FARNHAM and HOLLY PUTERBAUGH,
Appellants

v.

STATE OF VERMONT and TOWN OF MILTON
Appellees

Supreme Court Docket No. 98-32

Appeal from
Chittenden Superior Court
Docket No. S1009-97 CnC

AMICUS CURIAE BRIEF

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INTERESTS OF AMICI CURIAE

The Vermont Chapter of the National Organization for Women ("Vermont NOW") is devoted to ending discrimination on the basis of sex, sexual orientation, and race. In addition to advocating for economic justice and reproductive rights for women, Vermont NOW has called for an end to discrimination against gay men and lesbians in Vermont's civil marriage laws.

The National Center for Lesbian Rights ("NCLR") is a non-profit law firm which has been dedicated to securing the civil rights of lesbians for more than twenty years. Founded in 1977, NCLR has played a leading role in securing equal protection for lesbian and gay parent families and their children. NCLR appeared as *amicus* in Baehr v. Miike, 910 P.2d 112 (Haw. 1996) .

The National Organization for Women, Inc. ("NOW"), founded in 1966, is a national political organization of over 250,000 members which works to eliminate gender based discrimination throughout the United States. NOW participated as *amicus* in Baehr v. Miike, 910 P.2d 112 (Haw. 1996).

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. Expanding the rights of lesbians to be free of discrimination, and securing the rights of all women under state constitutions, are major concerns of NOW LDEF. NOW LDEF is *amicus* in Baehr v. Miike, 910 P.2d 112 (Haw. 1996), currently on appeal

to the Hawaii Supreme Court, arguing that Hawaii's refusal to grant marriage licenses violates the state constitution's prohibition of sex discrimination.

Now in its twenty-fourth year, Equal Rights Advocates ("ERA") is one of the country's oldest women's law centers. Founded in 1974, ERA is dedicated to the empowerment of women through the establishment of their economic, social, and political equality. ERA advances these goals through litigation, advice and counseling, public education and public policy initiatives. ERA represented the plaintiff in the first case in the Ninth Circuit to find sexual harassment a violation of Title VII, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). ERA has focused much of its effort on ensuring family-friendly workplaces, representing plaintiffs in two of the first pregnancy discrimination cases heard by the U.S. Supreme Court, Geduldig v. Aiello, 417 U.S. 484 (1974) and Richmond Unified School District v. Berg, 98 S.Ct. 623 (1977).

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Appellants' Brief.

QUESTIONS PRESENTED FOR REVIEW

I. DID THE TRIAL COURT ERR IN FAILING TO SUBJECT VERMONT'S SEX-BASED RESTRICTION ON MARRIAGE TO HEIGHTENED SCRUTINY?

II. DOES VERMONT'S STATUTORY RESTRICTION RELY ON IMPERMISSIBLE GENDER STEREOTYPES?

SUMMARY OF ARGUMENT

As interpreted by the trial court, Vermont's marriage statutes establish a facial classification based on sex. The trial court's failure to subject this sex-based classification to meaningful judicial review is a dangerous and unprincipled departure from established equal protection and sex discrimination law. This Court should not allow deference to "tradition" or animosity toward lesbians and gay men to provide a rationale for invidious discrimination based on sex.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO SUBJECT VERMONT'S SEX-BASED RESTRICTION ON MARRIAGE TO HEIGHTENED SCRUTINY.

A. Sex-Based Classifications Should Be Subject To Strict Scrutiny Under The Vermont Constitution.

The Vermont Constitution expressly promotes principles of equality and prohibits invidious discrimination in its Common Benefits Clause.¹

¹ V.S.A. Constitution, Chapter I, Article 7 ("[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community[.]"). There is no question that Article 7 protects women as well as men. See V.S.A. Constitution, Chapter II, § 76 (authorizing and directing the Justices of the Supreme Court "to revise Chapters I and II of the Constitution in gender inclusive language").

In applying Article 7, this Court has explained that government classifications founded on a suspect basis or burdening a fundamental right are subject to strict scrutiny, meaning they can only stand if narrowly tailored to serve a compelling government interest. See, for example, Brigham v. State, 8 Vt. L. Wk. 41, 47 (February 5, 1997). All other classifications must, at a minimum, "be reasonably related to the promotion of a valid public purpose." Lorrain v. Ryan, 160 Vt. 202, 212 (1993). See also Brigham, 8 Vt. L. Wk at 47; State v. Ludlow Supermarkets, Inc. 141 Vt. 261, 268 (1982). Although this Court has not yet determined the precise standard that applies to sex-based classifications under the Common Benefits Clause, see State v. George 157 Vt. 580 (1991) (declining to reach the issue), amici urge this Court to clarify for courts below that governmental classifications based on sex are subject to the most stringent level of state constitutional review.

As the ultimate arbiter of Vermont law, this Court has long maintained that the Vermont courts "are free . . . to provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter." State v. Badger, 141 Vt. 430, 448-49 (1982) (emphasizing that the Vermont Constitution "is an independent authority"). See also, Brigham, 8 Vt. L. Wk. at 44-47 (same); Hodgeman v. Jard Company, 157 Vt. 461, 464 (1991) (affirming that "the Vermont Constitution is freestanding and may require this Court to examine more closely distinctions drawn by state government than would the Fourteenth Amendment"). Thus, in light of this Court's expansive approach to state constitutional protections, the trial court correctly concluded that "it would be anomalous if the Vermont Constitution did not subject gender-based distinctions to scrutiny as searching as that required under the United States

Constitution's Equal Protection Clause of the Fourteenth Amendment." PC 266. See, e.g., State v. Kirchoff, 156 Vt. 1, 3-6 (1991) (the Vermont Constitution is at least as protective of individual rights as the United States Constitution, which provides a floor); Brigham, 8 Vt. L. Wk at 44-47 (same).

In United States v. Virginia 116 S.Ct. 2264 (1996) (VMI), the United States Supreme Court affirmed its "skeptical scrutiny" of government classifications based on sex in the strongest possible terms. Id. at 2274. Invoking "the core instruction of [the United States Supreme] Court's pathmarking decisions" in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) and Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), the Supreme Court held that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." 116 S.Ct. at 2274. "The burden of justification is demanding and it rests entirely on the State." Id. at 2275 (internal citations omitted). See also id. at 2275 (noting that "case law evolving since 1971 reveals a strong presumption that gender classifications are invalid") (internal citations omitted). Although the Supreme Court in VMI did not expressly hold that gender is subject to strict scrutiny, see id. at 2275 n.6, the forcefulness of the majority opinion in VMI has led many commentators to conclude that the Court has signaled its intention to subject sex-based classifications to a significantly more exacting standard of review.²

² See, e.g., id. at 2298 (Scalia, J., dissenting) (stating that the majority in VMI adopted a standard that "amounts to (at least) strict scrutiny"); Cass R. Sunstein, The Supreme Court 1995 Term: Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 6, 73 (1996) (VMI brings gender "closer to . . . 'strict scrutiny'"); Martin A. Schwartz, Equal Protection Developments, N.Y. L. J., July 17, 1996, at 3 (the analysis in VMI "fairly resembles strict judicial scrutiny"); Steven Delchin, United States v. Virginia and Our Evolving 'Constitution': Playing Peek-a-boo With the Standards of Scrutiny for Sex-Based Classifications, 47 Case W. Res. 1121, 1134 (1997) (VMI "presage[s] the Court's final 'evolution' to strict scrutiny for sex-based classifications"). See also Nabozny v. Padlesny, 92 F.3d 446, 456 n.6 (7th Cir. 1996)

The Supreme Court's analysis in VMI does not control this Court's review of sex-based classifications under Article 7. Nonetheless, the considerations that have informed the United States Supreme Court's evolving skepticism toward classifications based on sex provide persuasive authority for the need to subject sex to strict scrutiny in Vermont. See State v. Jewett, 146 Vt. 221, 226-27 (1985). In Frontiero v. Richardson, 411 U.S. 677 (1973), for example, the Supreme Court explained that "[w]hat differentiates sex from nonsuspect statuses . . . is that the characteristic frequently bears no relation to ability to perform or contribute to society." Id. at 688. Similarly, in J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127 (1994) the Court linked the need for heightened scrutiny of classifications based on sex to "the real danger that government policies that professedly are reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender." Id. at 135. See also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (stressing the need for close scrutiny of sex-based classifications that purport to be "benign"). And in VMI, 116 S.Ct. 2264 (1996), the Court reiterated the importance of closely scrutinizing sex-based restrictions to ensure that individual women who may be "outside the average" are not excluded from the benefits of equal participation in historically "male" institutions on the basis of overbroad "generalizations about 'the way women are'." Id. at 2284. These considerations apply with equal force in Vermont.

In contrast to the United States Supreme Court, which has been developing its current analysis of sex-based classifications under the federal constitution for more than twenty-five years, this Court is not constrained by direct Vermont precedent on sex-based classifications under Article 7. Amici urge this Court to reject the incrementalism of the

(noting that VMI may signal greater scrutiny for sex-based classifications); Engineering Contractors Ass'n

federal model and to hold that sex-based classifications are inherently suspect and thus subject to strict scrutiny under the Vermont Constitution. See, e.g., Hewitt v. State Accident Fund, 294 Ore. 33, 41-42 (Or. 1982) (declining to adopt the federal approach of "whittl[ing] away at stereotyped and outmoded notions of 'proper' roles for men and women" and noting that "[w]e are free in Oregon to begin our analysis of gender based laws on a clean slate.").

This Court should reject the Attorney General's intimation that Vermont's failure to adopt a state Equal Rights Amendment militates against strict scrutiny for gender-based classifications under the Vermont constitution. PC 49. At least two other states subject sex-based classifications to strict state constitutional scrutiny, despite the absence of an Equal Rights Amendment or other language specifically addressing sex. See Hewitt, supra, 294 Or. at 45 ("Oregon has no equal rights provision related specifically to gender, yet we do not feel constrained to limit our application of Article 1, § 20 [forbidding the granting of "privileges" to any citizen or class of citizens] on this basis."); Sail'er Inn v. Kirby 5 Cal. 3d 1, 17-20 (1971) (discrimination based on sex is subject to strict scrutiny under the California Constitution despite absence of gender-based language in state equal protection clause). In principle, moreover, the Attorney General's logic would preclude heightened protection for sex-based classifications under the federal constitution as well, a proposition that has been rejected by the United States Supreme Court for many years. See VMI, 116 S.Ct. at 2274-2275 (describing the Court's repudiation of the once "prevailing doctrine that government . . . could withhold from

of South Florida v. Metropolitan Dade County, 943 F. Supp. 1546, 1556 (S.D. Fla. 1996) (same).

women opportunities accorded to men so long as any 'basis in reason' could be conceived for the discrimination") (internal citations omitted).

In sum, amici urge this Court to invalidate the State's sex-based restriction on marriage under the most stringent level of state constitutional review. This approach is strongly supported by Vermont's tradition of independence and vigilance in protecting individual rights, as well as by the same considerations that have motivated the United States Supreme Court and courts in sister states to scrutinize government classifications based on sex under a skeptical standard of review, in an effort to redress the "long and unfortunate history" of discrimination based on sex. Frontiero, *supra*, 411 U.S. at 684.

B. Restricting The Right To Marry To Different-Sex Couples Facially Discriminates On The Basis of Sex.

Vermont's marriage statutes do not explicitly impose a sex-based classification on the right to marry.³ Nevertheless, the Attorney General maintains and the trial court held that the "plain meaning" of Vermont's statutes "demonstrate[s] the legislative intent to treat marriage as a state into which only opposite-sex couples are eligible to enter." PC 258. Thus, as interpreted by the Attorney General and by the trial court below, Vermont's marriage statutes restrict the right to marry based on sex. A man may marry his intended spouse if the spouse is female, but not if the spouse is male. Conversely, a woman is free to marry a man, but she is prohibited from marrying another woman. In either case, the restriction prevents marriage between two persons of the same sex on the basis of sex.

³ See 15 V.S.A. Chapter 1 (determining the requisites of a valid marriage and the eligibility of individuals to marry) and 18 V.S.A. Chapter 105 (prescribing the forms and procedures for obtaining a license and solemnizing a marriage).

The trial court's holding that this statutory prohibition does not establish a sex-based classification has no basis in logic or in law. In rejecting the Appellants' sex discrimination claim, the trial court held that "an individual's gender is irrelevant to the application of the marriage statutes," PC 266, and that the statutes do not establish a "sexual classification." Id. This holding is contrary to the trial court's own finding that the State's articulated justifications for the restriction "rely on impermissible presumptions about men and women." PC 268.

It is also contrary to the plain operation of the statutory prohibition, which expressly conditions the right to marry based on sex. As the Hawaii Supreme Court recently held, a statute that prohibits same-sex couples from the right to marry plainly "regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex. As such, [the statute] establishes a sex-based classification." Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993) (holding that Hawaii's statutory prohibition of same-sex marriages violates the state constitutional guarantee of freedom from discrimination based on sex). See also Brause and Dugan v. Bureau of Vital Statistics, Case No. 3AN-95-0562 CI (Alaska Superior Ct., February 27, 1998):

That [Alaska's statutory prohibition of same-sex marriage] is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. **Sex-based classification can hardly be more obvious.** Id. at 22 (holding that Alaska's statutory prohibition of same-sex marriage violates the state constitutional prohibition of classifications based on sex) (emphasis added). Amici urge this Court to reject the trial court's untenable holding that Vermont's statutory prohibition on same-sex marriage does not establish a sex-based classification.

C. The Trial Court's Deference to "Tradition" Is an Improper Evasion of Judicial Review and Violates Established Anti-Discrimination Principles Long Upheld by This and Other Courts.

1. The trial court's reliance on the "traditional" definition of marriage invokes the same circular logic resoundingly rejected in outdated case law concerning marital restrictions based on race.

The Appellants in this case seek enforcement of the Vermont Constitution and an end to sex discrimination in marriage. In rejecting the Appellants' constitutional claim, the trial court held that Vermont's statutory restriction does not discriminate on the basis of sex, because marriage "is now, and has traditionally been, defined as a union between the sexes." PC 257. It is true, as both the trial court and the Attorney General suggest, that courts in other states have relied upon conclusory references to the "common," "traditional," or "usual and ordinary" definition of marriage in declining to subject the categorical exclusion of same-sex couples from the right to marry to any meaningful judicial review. Opinion and Order, PC 257; State's Motion, PC 11-13. See, e.g., Singer v. Hara, 522 P.2d 1187, 1192 (Wash. 1974) (appellants "are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex"). It is equally true, however, that state courts prior to the United States Supreme Court decision in Loving v. Virginia, 388 U.S. 1 (1967), also relied upon conclusory appeals to "tradition" in repeatedly upholding statutory prohibitions on interracial marriages. See, e.g., Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) (upholding Virginia's prohibition of interracial marriage on the ground that "[t]he institution of marriage has from time immemorial been considered a proper subject for State regulation . . . to the end that family life . . . may be maintained in accordance with established tradition"); Kinney v.

Commonwealth, 71 Va. (30 Gratt.) 284, 285 (1878) (the State's power to prohibit interracial marriage rests on natural laws that "have been exercised by all civilized governments in all ages of the world").

Indeed, with the sole exception of the California Supreme Court, which invalidated California's statutory prohibition of interracial marriage in 1948, see Perez v. Lippold, 198 P.2d 17 (1948) every state court that ever considered the issue prior to Loving concluded that laws prohibiting interracial marriage were simply too longstanding and too widely accepted to merit serious review. In retrospect, there is little dispute that so-called "miscegenation" statutes discriminated on the basis of race, or that, even by the standards of the day, state courts improperly sought to evade the responsibility of judicial review by failing to acknowledge the discriminatory purpose and impact of marital restrictions based on race.⁴

Recourse to "tradition" has served a similar function in cases about same-sex marriage, allowing state courts to circumvent the normal application of state constitutional standards and to exempt these explicitly sex-based classifications from any meaningful judicial review.⁵ In the case at bar, the trial court's deference to the "traditional" definition of marriage substitutes for judicial review. In concluding that same-sex couples simply "fall outside the definition of marriage," which "is now, and has traditionally been, defined as a union between the sexes," PC 257, the court begs the

⁴ The United States Supreme Court acknowledged the actual significance of laws prohibiting interracial marriage in Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 409 (1857), describing them as a "stigma, of the deepest degradation . . . fixed upon the whole race").

⁵ See, e.g., Dean v. District of Columbia, 653 A.2d 307, 308 (D.C. Ct. App. 1993) (holding that the "traditional" definition of marriage "necessarily disposes of the equal protection issue").

question of whether the "traditional" definition relies upon and perpetuates a constitutionally impermissible classification.

Plainly, however, if recourse to the "original" or "traditional" definition of a right was a sufficient response to discrimination claims, courts would be powerless to respond to changing social conditions, and the landscape of civil rights protections would look very different than it does today. Women would not be permitted to practice law. Cf. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140 (1872) ("It certainly cannot be affirmed, as an historical fact, that [the right to practice law] has ever been established as one of the fundamental privileges and immunities of the sex") (Bradley, J., concurring). And racial segregation would still be legal. Cf. Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color").

Two states already have recognized the fallacy of the trial court's deference to "tradition" as a means of circumventing Appellants' constitutional claim. As the Hawaii Supreme Court has stated, the "argument that prohibiting same-sex couples from the right to marry does not implicate [sex discrimination] because same sex marriage is an innate impossibility" is transparently "tautological." Baehr v. Lewin 852 P.2d 44, 63 (Hawaii 1993) (striking down Hawaii's prohibition on same-sex marriage as a violation of the state constitutional guarantee of equality on the basis of sex). Similarly, an Alaska court concluded that:

The plaintiffs' motion challenges the very definition of marriage found in the [Alaska] Code. . . . It is not enough to say that "marriage is marriage" and accept without scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only

be, what we are familiar with. . . . In light of [the plaintiffs'] challenge to the constitutionality of the relevant statutes, this Court cannot defer to the legislature or familiar notions when addressing this issue.

Brause and Dugan v. Bureau of Vital Statistics, Case No. 3AN-95-0562 CI (Alaska Superior Ct., Feb. 27, 1998) (holding that Alaska's different-sex marriage restriction violates the state constitutional guarantees of privacy and equal protection).

As the Vermont Supreme Court has stressed, "[w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment." In re B.L.V.B., 160 Vt. 368 (1993) (interpreting adoption statute to allow woman to adopt her same-sex partner's child).⁶ Amici urge this Court to protect the integrity of Vermont's Constitution by reversing the trial court's unwarranted deference to "tradition" and by invalidating Vermont's sex-based restriction on marriage under the established standards of state constitutional review.

2. Reliance on "tradition" to perpetuate a sex-based restriction is inconsistent with Vermont's rejection of other sex-based classifications within marriage.

The trial court's failure to recognize that the "traditional" definition of marriage constitutes sex discrimination and should therefore be subjected to close scrutiny is particularly troubling in light of Vermont's otherwise uncompromising commitment to abolish sex-based distinctions in marriage. By deferring to the "traditional" definition of

⁶ See also Medical Center Hosp. v. Lorrain, 165 Vt. 12 (1996) (abolishing the sex-based common law doctrine of necessities under the federal equal protection clause where "the [historical] circumstances that led to the emergence of the . . . doctrine no longer exist"); Richard v. Richard, 131 Vt. 98 (Vt. 1973) (affirming that "a married woman is a 'person' under the Constitution of Vermont" and abolishing interspousal tort immunity on the ground that "each time a rule of law is applied it [must] be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice"); J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419, 1428-29 n.15 (1994) (tradition is insufficient to excuse gender discrimination, since many traditions, "such as de jure segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause").

marriage, the trial court adopted an approach that has been expressly prohibited by this Court, which has consistently invalidated sex-based distinctions that perpetuate the historical legacy of legal discrimination against married women.

Thus, in deciding sex discrimination cases which raised federal equal protection claims, this Court has twice held that government classifications that distinguish between husbands and wives based on sex are **presumptively** invalid, even under rational basis review. In Whitney v. Fisher 138 Vt. 468 (1980), the Court held that a Vermont common law cause of action for loss of consortium which limited the right to the action exclusively to men failed to serve any legitimate governmental objective. Id. at 472 (finding that "no facts could reasonably be conceived to justify a general rule denying a woman an action for loss of consortium, while recognizing the right in a man"). More recently, in Medical Center Hosp. v. Lorrain 165 Vt. 12 (1996) (MCHV), the Vermont Supreme Court considered the viability of the old common law doctrine of necessities, which required husbands to assume financial liability for "necessary" expenses incurred by their wives but did not impose a reciprocal responsibility on wives. Rather than extending the doctrine to wives as well as husbands, as some other state courts have done, the Court opted to abolish it altogether, id. at 15, on the ground that the doctrine was a vestige of historical "circumstances that . . . no longer exist." Id.

Similarly, in R. & E. Builders, Inc. v. Frederick and Frances H. Chandler, 144 Vt. 302 (1984), this Court rejected the notion that "tradition" is a sufficient justification for a sex-based classification in marital law. Reversing the lower court's holding that a wife was responsible for a debt incurred by her husband, this Court summarized and rejected the "traditional" definition of marriage under the common law:

In holding Mrs. Chandler liable on a note signed by her husband, the trial court apparently applied the old common law legal fiction that a husband and wife are one person for most legal purposes. At common law, the legal existence of a wife was suspended during the marriage. . . . Thus, . . . a wife could not sue anyone for a tort committed against her without her husband's consent; neither could she be sued for committing a tort without having her husband joined as a defendant. In courts of law all contracts entered into or deeds executed by a married woman were void, and in courts of equity, a wife's contracts were enforced only if they involved her own separate estate.[⁷] Upon marriage, a husband acquired vested interests in his wife's property. . . . In summarizing his discussion of the legal consequences of marriage for women at common law, Blackstone observed that . . . 'even the disabilities which wife lies under are for the most part intended for her protection and benefit; so great a favourite is the female sex of the laws of England'.[⁸]

Id. at 303-04 (internal citations omitted).

In recent decades, the Vermont Legislature and Vermont courts have overwhelmingly rejected the "traditional" premise that sex discrimination is necessary or intrinsic to the very definition and meaning of marriage. See Richard v. Richard, 131 Vt. 98, 104 (1973) (Vermont has released married women from "the thralldom of the common law" and rejected the premise that marriage is defined by "the supposed vassalage of the wife or the imagined lordliness of the husband") (internal citations omitted). Thus, a wife is no longer required to assume her husband's surname or to accede to his choice of domicile. Husbands are no longer entitled to subject their wives to physical "discipline,"⁹

⁷ The Illinois Supreme Court initially relied on this aspect of the so-called "coverture doctrine" in its refusal to admit Myra Bradwell to the Illinois bar, arguing that as a married woman, her contracts were not binding and hence that her marital status would preclude her from establishing a contractual relationship with her clients. In re Bradwell, 55 Ill. 535, 535 (1869).

⁸ Almost two hundred years later, the United States Supreme Court characterized Blackstone's comment as "self-deluding romanticism." United States v. Dege, 364 U.S. 51, 54 (1960) (rejecting the "one legal person" conception of marriage as based on "medieval views regarding the legal status of woman"). As Supreme Court Justice Hugo Black summarized the common law definition of marriage in 1966, "though the husband and wife are one, the one is the husband." United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

⁹ See, e.g., Joyner v. Joyner, 59 N.C. 322, 325 (1862), in which the North Carolina Supreme Court held that a man's horsewhipping of his wife did not constitute grounds for divorce. "The wife must be subject to her husband. . . . Such have been the incidents of marriage relation from the beginning of the human race. Unto

to invoke the doctrine of interspousal tort immunity, see Richard v. Richard, *supra*, or to engage in marital rape without criminal liability. See 13 V.S.A. § 3252, Historical Comments (1997) (noting the 1985 amendment that deleted the phrase "other than a spouse" from the statutory definition of sexual assault). Child custody determinations are no longer weighted in favor of either sex. See 15 V.S.A. § 665(c) ("the court shall not apply a preference for one parent over the other because of the sex of the child [or] the sex of a parent").¹⁰ And wives are no longer automatically entitled to their husband's financial support, nor husbands to their wives' domestic services. See MCHV, 165 Vt. 12 (1996) (abolishing doctrine of necessities); and R. & E. Builders, 144 Vt. 302 (1984).

Like other sex-based classifications within marriage that have been struck down by courts or eliminated through legislative reform, Vermont's different-sex restriction on marriage is a vestige of the "traditional" common law definition of marriage and perpetuates discrimination based on sex. The trial court's conclusory determination otherwise is an unjustified departure from the vigilance with which Vermont courts have scrutinized sex-based classifications within marriage. Amici urge this Court to subject the restriction to heightened review, in accordance with the Vermont Constitution and with courts' responsibility "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional . . . assumptions about the proper role of men and women." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725-26 (1982).

the woman it is said, 'Thy desire shall be to thy husband, and he shall rule over thee', Genesis chap. 3, v. 16. It follows that the law gives the husband power to use such degree of force as is necessary to make the wife behave herself and know her place." Id. at 325.

¹⁰ See also Hubbell v. Hubbell, 1997 Vt. LEXIS 248 (Sept. 19, 1997) (Vermont Supreme Court remanded custody case where the trial court improperly relied on gender in awarding custody of male child to the father).

D. The Trial Court's "Equal Application Theory" Has Been Rejected as Unpersuasive And Disingenuous In Other Areas Of Equal Protection And Anti-Discrimination Law.

The trial court reasoned that Vermont's marriage statutes do not discriminate on the basis of sex because "the statutes apply evenhandedly to both sexes." PC 266. The United States Supreme Court has directly confronted and rejected this "equal application theory" in cases dealing with interracial marriage and with government benefits that are conditioned on sex.

In Loving v. Virginia, 388 U.S. 1 (1967), the Commonwealth of Virginia argued that "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based on race." Loving, 388 U.S. at 7. The State's argument in the case at bar is identical to the discredited position of the State in Loving: substituting "sex" for "race" and "women and men" for "the white and the Negro" yields the identical argument made by the State in this case.

The Supreme Court in Loving "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications" from the guarantee of equal protection. Id. Indeed, in an earlier case, the Court explained that such a race restriction "treats the interracial couple made up of a white person and a Negro differently than it does any other couple." McLaughlin v. Florida, 379 U.S. 184, 188 (1964). Such sleight-of-hand efforts to take a statute that specifically relies on race (or sex) to restrict marital choice and to claim that because people of all races (or both sexes) are "disadvantaged equally" there is no invidious discrimination has been resoundingly repudiated by the Supreme Court during this

nation's civil rights struggles of the 1960s. This Court should decline the Attorney General's invitation to turn back the clock.

The United States Supreme Court has also rejected the "equal application theory" in a case dealing with a sex-based restriction under the former Aid to Families with Dependent Children, Unemployed Father (AFDC-UF) program. See Califano v. Westcott, 443 U.S. 76 (1979). The AFDC-UF program provided benefits to families whose dependent children had been deprived of parental support because of the father's unemployment, but did not provide such benefits when the mother became unemployed. Id. at 78. Like the Attorney General and the trial court in this case, the government in Westcott denied that the gender qualification provided "benefits to a [man] where it denie[d] them to a [woman]" or otherwise "discriminate[d] against women as a class," on the theory that the restriction applied equally to all family units and thus "necessarily affect[ed], to an equal degree, one man, one woman, and one or more children." Id. at 83-84. Similarly, in the case at bar, the State denies that the different-sex restriction on marriage confers a benefit or imposes a burden on either sex, on the theory that excluding same sex couples from the right to marry is simply an "equal application of a statute that creates a permissible and inclusive category containing both sexes." State's Motion, PC 53. See also Opinion and Order, PC 266. ("Requiring a member of each sex to create a marriage does not favor one sex over the other, and does not constitute invidious discrimination based on gender.").

The United States Supreme Court in Westcott rejected the government's argument that "even if the statute is gender-based, it is not gender-biased." 433 U.S. at 84. "For mothers who are the primary providers for their families, . . . [the restriction] is obviously

gender biased, for it deprives them and their families of benefits solely on the basis of sex." Id. at 84. Finding that "the statute discriminates against one particular category of family -- that in which the female spouse is a wage earner," id., the Court invalidated the gender-based restriction on AFDC benefits as an impermissible legislative concession to the "the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life." Id. at 89 (internal citations and quotation marks omitted). "From all that appears," the Court concluded, "Congress, with an image of the 'traditional family' in mind, simply assumed that the father would be the family breadwinner[.]" Id. at 88.

Likewise, in the case at bar, there can be no genuine dispute that Vermont's marital restriction is "gender-biased" as well as "gender-based." Like the sex-based classification in Westcott, it "deprives [same sex couples] and their families of [the] benefits [of marriage] solely on the basis of sex" and discriminates against "one particular category of family" -- that in which both members of the marital couple are the same sex. As the United States Supreme Court recognized in Westcott, sex-based classifications that penalize those whose families do not conform to "sexual stereotypes" or to "an image of the 'traditional family'" should not be subject to a lowered or compromised standard of review simply because they target a politically unpopular group. Amici urge this Court to reject the State's discredited "equal application theory" and to invalidate Vermont's different-sex restriction on marriage in accordance with established principles of equal protection and anti-discrimination law.

II. VERMONT'S STATUTORY RESTRICTION RELIES ON IMPERMISSIBLE GENDER STEREOTYPES.

A. The Attorney General's Reliance On The Purported "Complementarity" Of "Male and Female Qualities" As A Justification For Sex Discrimination In Marriage Is Unlawful Under Established Equal Protection And Anti-Discrimination Law.

The trial court's failure to find that the marriage statutes discriminate on the basis of sex and therefore should be subject to heightened scrutiny (see Section I, supra) is particularly troubling in light of its explicit finding that the State's articulated justifications are "clearly premised upon improper presumptions about the roles of men and women." PC 268.¹¹ The Attorney General concedes that the purpose of Vermont's statutory restriction is to reinforce the "differences (biological, cultural, and psychological)" between men and women. PC 59. Indeed, there is no more direct or chilling testament to the invidious sex discrimination at the heart of Vermont's sex-based restriction on marriage than the Attorney General's reliance on a veritable litany of impermissible gender stereotypes, including the suggestion that sex discrimination in marriage is justified by the alleged "complementarity" of "male and female qualities and contributions" and of "innate and unique abilities and characteristics that each sex possesses," PC 59, 60, as well as by the hypothesis that women have "a different structure to their thinking" and speak in a "different voice." PC 229-30 (citing Carol Gilligan, In A Different Voice (1982)).

The State's idealized characterization of these impermissible generalizations as a benign attempt to "venerate the diversity between men and women," PC 52, is a

¹¹ Under longstanding federal precedent, which provides a floor, this finding is sufficient, without more, to trigger heightened scrutiny. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (A plaintiff is not required "to prove that the challenged action rested solely on racially discriminatory purposes [R]acial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."); accord Personnel Administrator v. Feeney, 442 U.S. 265, 276-77 (1979)

dangerous throwback to the "romantic paternalism" that the United States Supreme Court has repeatedly and emphatically rejected as impermissible stereotyping under federal equal protection law.¹² See Frontiero v. Richardson, 411 U.S. 677, 684 (1973) ("There can be no doubt that our nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."). See also Sandra Day O'Connor, Portia's Progress, 66 N.Y.U. L. Rev. 1546, 1553 (1991) ("asking whether women . . . speak with a 'different voice' than men do is a question that is both dangerous and unanswerable") (rejecting research on purported gender differences as a legitimate basis for sex discrimination). Moreover, the Supreme Court has expressly held that "'benign' justifications proffered in defense of categorical exclusions [based on sex] will not be accepted automatically[.]" VMI, 116 S.Ct. at 2277 (rejecting Virginia's claim that the exclusion of women from VMI was designed to promote "educational diversity").¹³

The possibility that the State's asserted beliefs about the psychological and cultural differences between men and women may be accurate for some people is completely irrelevant as a matter of law. In VMI, 116 S.Ct. 2264 (1996), the United

(holding that the "principles [articulated in Arlington Heights] apply with equal force to a case involving alleged gender discrimination"). 442 U.S. at 274.

¹² The State's attempt to justify sex discrimination in marriage through arguments based on the purportedly "innate" characteristics of women is also disturbingly reminiscent of discredited arguments used to justify discrimination based on race. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 551 (1896) ("Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences"); Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) (different races have "their own distinctive characteristics and culture and . . . their own peculiar genius"); Berea College v. Commonwealth, 94 S.W. 623, 626 (Ky. 1906) ("The separation of the human family into races, distinguished no less by color than by temperament and other qualities, is as certain as anything in nature"). See also *infra*, Section II.C.3.

¹³ See also International Union, UAW v. Johnson Controls, 111 S.Ct. 1196, 1203-04 (1991) (Offering a "benign" motive for a fetal-protection policy does not "convert a facially discriminatory policy into a

States Supreme Court expressly dismissed the State's expert testimony regarding "typically male or female 'tendencies'" on the ground that such evidence simply has no bearing on a sex discrimination claim: "since this Court's turning point decision in Reed v. Reed, we have cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia and relied on by the District Court." Id. at 2279-80. See also J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419, 1427 n.11 (1994) ("gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization"). For that reason, courts have rejected laws based on generalizations about women. See Orr v. Orr, 440 U.S. 268 (1979) (more women than men require alimony); Craig v. Boren, 429 U.S. 190 (1976) (more men than women drink and drive); Reed v. Reed, 404 U.S. 71 (1971) (more men than women likely to be qualified to administer estates).

B. The State's Asserted Reliance On Procreation As A Justification For Sex Discrimination In Marriage Has No Basis In Reality Or In Law.

The Attorney General's argument that Vermont's prohibition on same-sex marriage is justified by the link between marriage and procreation, PC 50-51, is blatantly contrary to reality and to law. The Attorney General's assertion that there is a "legitimate overriding purpose," PC 50, in restricting marriage to couples who are capable of procreation is belied by the reality that no such restriction exists. The State does not bar post-menopausal women, infertile couples, or any others who are unable or unwilling to procreate from the right to marry, nor could it do so under settled law.

neutral policy," because "[w]hether an employment practice involves disparate treatment . . . does not

The United States Supreme Court has clearly held that the constitutionally protected right to reproductive autonomy is independent of a person's marital status. Individuals have the right to choose whether or not they want to have children. See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (invalidating a law making contraceptives less available to single than to married people, and affirming "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating state ban on commercial distribution of nonmedically prescribed contraceptives). Married couples have the right to prevent conception through the use of contraceptives. See Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a law prohibiting the sale of contraceptives). Women have the right to choose whether to carry a pregnancy to term without undue coercion or interference from the state. See Roe v. Wade, 410 U.S. 113 (1973) (holding that right to privacy protects a woman's choice to have an abortion). And the United States Supreme Court has affirmed that this right belongs solely to the woman herself, without regard to her marital status. See Planned Parenthood v. Casey, 112 S.Ct. 2791, 2831 (1992) (invalidating a statute that required a woman to notify her husband before obtaining an abortion).

The Attorney General's reliance on procreation as a purported justification for sex discrimination in marriage evokes the discredited sex discrimination jurisprudence of the late nineteenth and early twentieth centuries, when courts routinely upheld sex-based restrictions on women's ability to participate in a wide range of activities on the ground

depend on why the employer discriminates but rather on the explicit terms of the discrimination").

that women's childbearing capacity required them to be mothers and confined them to particular social roles. See, e.g., Bradwell v. Illinois ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."); Muller v. Oregon, 208 U.S. 412, 422-23 (1908) (upholding legislation limiting the maximum hours a woman could work based on finding that a woman's "physical structure and a proper discharge of her maternal functions -- having in view not only her own health, but the well-being of the race -- justify legislation to protect her[.]"); Radice v. New York, 264 U.S. 292, 294 (1924) (upholding legislation barring women from night jobs based on need to prevent impairment of women's "peculiar and natural functions"); Breedlove v. Suttles, 302 U.S. 277, 282 (1937) (holding that the "burdens necessarily borne by [women] for the preservation of the race" made it permissible for the state to discourage women from voting); Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding the exemption of women from jury duty on the ground that "woman is still regarded as the center of home and family life").

In the United States Supreme Court's unwavering repudiation of this old jurisprudence in cases decided since Reed v. Reed, 404 U.S. 71 (1971), the Court has never held, as the Attorney General wrongly suggests, that the mere invocation of "a physical, biological sex difference" is sufficient to justify governmental discrimination based on sex. PC 50. The Attorney General's reliance on the United States Supreme Court's decision in VMI in support of this erroneous proposition is particularly misleading and misplaced. PC 50, 52. Far from suggesting that physical differences between men and women legitimate discrimination, the Supreme Court in VMI explicitly reversed the district court's reliance on this rationale. Rejecting the district court's

findings of fact, which included a three-page list enumerating physical differences between women and men, see United States v. Virginia, 766 F. Supp. 1407, 1432-34 (W. D. Va. 1991) (finding, inter alia, that men are stronger, faster, leaner, and less prone to physical injury than women), the Supreme Court expressly reiterated the Court's previous emphasis on the very narrow circumstances in which sex-based classifications may be used to remedy past discrimination or to place men and women on equal footing:

Sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women.

VMI, 116 S.Ct. at 2276 (internal citations and quotation marks omitted).

Excluding same-sex couples from the right to marry in the purported interest of "furthering the link between procreation and child-rearing," PC 61, does not serve to remedy past discrimination or to promote equality of opportunity. On the contrary, excluding same sex couples from the right to marry "perpetuates the legal, social, and economic inferiority of women," VMI, 116 S.Ct. at 2276, by reinforcing the now discredited stereotypical presumption that women are defined by their reproductive capacities and by "[t]he paramount destiny . . . [of fulfilling] the . . . offices of wife and mother." Bradwell v. Illinois, 83 U.S. 130, 141-42 (1872). Historically, women's biological capacity to bear children has been the social justification for the imposition of legal disabilities banning women from participation in society except as wives and mothers.¹⁴ As the United States Supreme Court has made clear, women do not "owe . . .

¹⁴ See, e.g., UAW v. Johnson Controls, Inc. 499 U.S. 187, 211 (1991) ("Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities");

[a] duty [to bear children] as a matter of course" and cannot "simply be forced to accept the 'natural' status and incidents of motherhood," Casey, 112 S.Ct. at 2847 (Blackmun, J., concurring in part and dissenting in part). The State cannot invoke women's childbearing capacity as a rationale for legislation based on "the common law status of married women [that is] repugnant to our present understanding of marriage and of the nature of the rights secured by the constitution." Id. at 2831. See also O'Connor, Portia's Progress, 66 N.Y.U. L. Rev. 1546, 1554-57 (1993) (rejecting notion that biological differences related to procreation are a legitimate rationale for discrimination).

In sum, the State's purported reliance on procreation as a legitimate rationale for sex discrimination is implausible on its face, inconsistent with established law, and rooted in damaging and impermissible stereotypes about the purportedly inevitable social consequences of women's reproductive capacity.

C. Laws That Exclude Same-Sex Couples From The Right To Marry Are Rooted In Stereotypical Assumptions About Gender And Perpetuate Women's Legal, Social, and Economic Disadvantage.

Scholars from a wide variety of disciplines have confirmed what common experience and common sense already suggest: namely, that bias against lesbian and gay relationships is rooted in the stereotypical belief that the anatomical differences between women and men necessarily entail different gender roles, including the traditional expectation that men should "naturally" be attracted only to women and that women

California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987) (protective labor legislation of early 20th century reflected "stereotypical notions about pregnancy and the abilities of pregnant workers"); Califano v. Webster, 430 U.S. 313, 317 (1977) (rejecting the stereotype that women are "child-rearers," not breadwinners); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (rejecting the assumption that women are "destined solely for the home and the rearing of the family").

should "naturally" only be attracted to men.¹⁵ In the past, states prohibited interracial marriages because interracial relationships threatened the power of the dominant "white" class by exposing the artificiality and mutability of racial stereotypes and race-based classifications. See, e.g., A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L. J. 1967, 1983 (1989) (laws prohibiting interracial marriage were motivated by the desire to maintain a mythical racial purity). Similarly, most states prohibit same sex marriages today because same-sex relationships undermine the myth that men and women "naturally" assume "complementary" gender roles and thus threaten the stereotypical assumptions that have been used to limit women's opportunities and to keep women in their "proper" role.

In particular, lesbian and gay relationships threaten the traditional definition of men as "naturally" active and dominant, and of women as "naturally" passive, subordinate, and dependent on men.¹⁶ Thus, while gay men are stereotyped as "emasculated" or "effeminate,"¹⁷ lesbians are "perceived as [women] who ha[ve] stepped out of line . . . [by] mov[ing] out of sexual\economic dependence on a male" and who

¹⁵ See e.g., Deborah L. Rhode, *Lesbians in the Law: Sex-Based Discrimination: Common Legacies and Common Challenges*, 5 S. Cal. Rev. L. & Women's Stud. 11, 14 (1995) ("Both discrimination on the basis of sex and discrimination on the basis of sexual orientation have rested on similar assumptions about gender differences."); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187 (1988) ("[L]egal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning of gender"); Michael Ruse, *Homosexuality: A Philosophical Inquiry* (1988) (negative societal attitudes toward homosexuality cannot be separated from stereotypical beliefs about men and women); Joseph Bristow, *Homophobia/Misogyny: Sexual Fears, Sexual Definitions*, in *Coming On Strong: Gay Politics and Culture* 54-75 (Simon Shepherd & Mick Wallis eds., 1989) (homophobia is rooted in misogynist attitudes and beliefs about women).

¹⁶ See Law, *supra*, 1988 Wis. L. Rev. at 210 ("Lesbians and gay men pose a formidable threat to the classic gender script.").

¹⁷ See, e.g., Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511 (1992) (describing

therefore pose a threat "to male dominance and control, to the very heart of sexism." Suzanne Pharr, Homophobia: A Weapon of Sexism 18 (1988). Researchers who have explored the psychological basis of homophobia have confirmed this analysis, finding a consistent relationship between animosity toward same-sex relationships and a desire to maintain traditional concepts about appropriate gender roles. See A.P. MacDonald & Richard G. Games, Some Characteristics of Those Who Hold Positive and Negative Attitudes Toward Homosexuals, 1 J. Homosexuality 9, 19 (1974.) ("[A] major determinant of negative attitudes toward homosexuality is the need to keep males masculine and females feminine, that is, to avoid sex-role confusion."¹⁸ Cf. Law, supra, at 18 ("[W]hen homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity.").

Conversely, men and women who are perceived to deviate from traditional gender expectations and gender roles are routinely stigmatized as "lesbian" or "gay," no matter what their actual sexual orientation. In the work place, for example, men who do not conform to traditional notions of masculinity are frequently labeled as "gay" and harassed on that basis. See, e.g., Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997) (describing severe verbal, physical, and sexual harassment of young heterosexual male

pervasiveness of misogynist stereotypes equating gay men with women as a means of stigmatizing and demeaning them).

¹⁸ See also Daniel Goleman, Homophobia: Scientists Find Clues To Its Roots, New York Times, July 10, 1990, at C1; G. Herek, Heterosexuals' Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences, 25 J. Sex. Res. 451, 470-73 (1988); Bernard E. Whitley, Jr., The Relationship of Sex-Role Orientation to Heterosexuals' Attitudes Toward Homosexuals, 17 Sex Roles 103 (1987); Krulowitz & Nash, Effects of Sex-Role Attitudes and Similarity on Men's Rejection of Male Homosexuals, 38 J. Personality & Soc. Psychol. 67 (1980); Laer & Laner, Personal Style of Sexual Preference: Why Gay Men Are Disliked, Int'l Rev. Mod. Sociology 215 (1979); Dunbar, Brown & Amoroso, Some Correlates of Attitudes Towards Homosexuality, 89 J. Soc. Psychology 271 (1973).

employee who was habitually referred to by his male coworkers as "the queer" or "the fag" because of his perceived failure to "conform to male standards"), vac'd and remanded, 1998 U.S. LEXIS 1635 (U.S. March 9, 1998); Oncale v. Sundowner Offshore Serv's, 1998 U.S. LEXIS 1599 (March 4, 1998). Similarly, women who work in traditionally "male" jobs, who engage in stereotypically "male" activities, who espouse a belief in equal rights for women, or who decline sexual advances from men are routinely accused of being lesbians. See, e.g., M. Martine, Hard-Hatted Women: Stories of Struggle and Success in the Trades 14 (1988) (noting the frequency of "lesbian-baiting," *ie.*, accusations of lesbianism, as a tactic used by men to harass women workers in traditionally male jobs; Catherine MacKinnon, Feminism Unmodified 122 (1985) ("[W]omen athletes are routinely accused, explicitly or implicitly, of being lesbian."); Michelle Beneke & Kirstin S. Dodge, Lesbian Baiting as Sexual Harassment: Women in the Military, in Homophobia: How We All Pay the Price 167-76 (Warren J. Blumenfeld ed., 1992) (describing the pervasive use of lesbian-baiting to intimidate female service members and to deter them from lodging complaints about sexual harassment); Pharr, supra, at 24 (noting that women who oppose sex discrimination are often labelled lesbians).

In sum, animosity toward lesbians and gay men and legal prohibitions on same-sex marriage cannot be separated from the "baggage of sexual stereotypes" that has perpetuated women's legal, social, and economic inferiority and that has been rejected as a legitimate basis for discrimination by this and other courts. Absent these stereotypes, there is no basis for prohibiting an individual from marrying his or her chosen partner on the basis of sex.

CONCLUSION

As interpreted by the trial court, Vermont's marriage statutes restrict the right to marry based on sex. The trial court erred in failing to subject this sex-based classification to heightened review, as mandated by the Vermont Constitution. For the reasons stated above, amici urge this Court to reverse the trial court's holding and to invalidate Vermont's sex-based marital restriction as a violation of the state constitutional right to freedom from government discrimination based on sex.

Respectfully submitted,
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