I. STATEMENT OF INTEREST

The Association of the Bar of the City of New York ("ABCNY") is one of the oldest and largest professional associations in the United States. Founded in 1870 to improve the administration of justice, promote the rule of law, and elevate the legal profession's standards of integrity, honor, and courtesy, the ABCNY was among the first bar associations to have a committee addressing lesbian and gay issues.

ABCNY has over 23,000 members and has long taken an active interest in protecting the legal rights of the diverse types of families that compose modern American society.

With respect to the particular questions raised here, ABCNY, through its long-standing involvement in these issues and on behalf of the public its members represent, has a vital interest in ensuring the right of people to marry whom they choose, including people of the same sex. Courts in the United States have been wrestling with this issue for close to two decades and we offer this review of the status of jurisprudence in the United States on the issue of marriage for same-sex couples in order to assist the Colombian Supreme Court as it considers this issue for the citizens of Colombia.

II. INTRODUCTION

The issue before the honorable Constitutional Court of Colombia in this case is whether the definition of marriage in Article 113 of the Colombian Civil Code and in Article 2 of la Ley 294 de 1996 as existing between a man and a woman is contrary to the Equal Protection Clause of the Constitution of Colombia (Article 13).

Amicus curiae respectfully submits this brief to provide the Court with an overview of the judgments courts in the United States have reached when faced with

similar questions. Article 13 of the Constitution of Colombia provides for equal protection of the law and prohibits discrimination on the basis of several enumerated grounds. Importantly, this Article is essentially identical to the equal protection provisions that courts in the United States have analyzed in the decisions to discussed below.

Accordingly, *amicus curiae* respectfully requests that in determining the constitutionality of Article 113 of the Colombian Civil Code and Article 2 of la Ley 294 de 1996, this Court find the analysis presented here persuasive as to the proposition that the Colombian Constitution's guarantee of equality before the law permits same-sex couples to marry.

III. EQUAL PROTECTION ANALYSIS IN THE UNITED STATES

In the United States, a federalist system of government grants each of the fifty states broad powers of self-governance. Laws regulating marriage, such as the age at which a person can permissibly marry, have traditionally been a matter of state regulation. As a result of this structure, the evolution and availability of marriage for same-sex couples in the United States has largely occurred at the state court level and in state legislatures.

The broad powers granted to the states are not unlimited, however. Among other things, they are constrained by guarantees in the United States Constitution that protect certain fundamental individual rights, which cannot be infringed. In addition, each state has its own constitution, and in some areas, the individual rights and protections guaranteed under those state constitutions can be broader than those guaranteed under the United States Constitution.

The most important Constitutional guarantee at issue here is that of equal protection under the law. The Fourteenth Amendment to the United States Constitution guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the law." U.S. Const., amend. XIV, § 1. This equal protection provision is less explicit than Article 13 of the Colombian Constitution, in that the Fourteenth Amendment does not set forth a specific list of protected characteristics. See Columbia Const., art. 13 (protecting individuals from "discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy"). Instead, in jurisprudence in the United States, the categories of persons protected from discriminatory governmental action has been the product of years of judicial development. See, e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 829 (2007) (noting the Fourteenth Amendment "sought to bring into American society as full members those whom the Nation had previously held in slavery"); Craig v. Boren, 429 U.S. 190 (1976) (applying the Fourteenth Amendment's equal protection clause to a matter sex discrimination); Romer v. Evans, 517 U.S. 620 (1996) (applying equal protection to discrimination against homosexual persons); Graham v. Richardson, 403 U.S. 365 (1971) (applying equal protection analysis to non-citizens); Vance v. Bradley, 440 U.S. 93 (1979) (applying equal protection to discrimination on the basis of age); Heller v. Doe by Doe, 509 U.S. 312 (1993) (applying equal protection analysis to individuals with mental retardation.)

The concept of equal protection has also been applied to laws involving marriage, as well as issues touching upon intimate personal relations. For example, as recently as 1967, sixteen states in the United States forbade interracial marriage. These laws were

struck down as unconstitutional on equal protection grounds by the United States Supreme Court, which held that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." Loving v. Virginia, 388 U.S. 1, 12 (1967). Equal protection grounds were also the basis for the Supreme Court striking down a law preventing persons from purchasing contraceptives in Griswold v. Connecticut, 381 U.S. 479 (1965), and a state statute that criminalized homosexual sodomy in Lawrence v. Texas, 539 U.S. 558 (2003).

Many state constitutions have explicitly adopted the concept of equal protection embodied in the Fourteenth Amendment. Accordingly, much of the development of the law regarding marriage for same-sex couples has employed what United States jurisprudence calls "equal protection analysis," which looks to a law's potentially discriminatory purposes and effects balanced against whether the law serves a legitimate state interest. How compelling that state interest must be depends on the nature of the legal restriction, and on whether the law targets a group of persons who have experienced a history of discrimination.

Different standards of judicial review have evolved to frame and guide legal analysis of this issue. "Rational basis review" is the lowest standard the government has to overcome to demonstrate that a law does not violate equal protection standards. See, e.g., Vance v. Bradley, 440 U.S. at 97 (employing rational basis review to hold that a statute requiring certain federal employees to retire at age 60 did not violate equal protection). Under rational basis review, a law is held to be constitutional so long as it reasonably relates to a legitimate government purpose. For example, a law specifying that school bus drivers must be of a certain height in order to see over the steering wheel

would probably be held to be a rational exercise of judgment by the government, notwithstanding the fact that it might disproportionately affect women because men are taller on average than women. On the other hand, a law mandating that school bus drivers must be male would almost certainly be held to be lacking a rational basis, even if height were offered as a supporting rationale.

Courts use rational basis review when the law at issue does not affect any "fundamental right," or target or have disproportionate impact on any group of people occupying a "suspect class." See Romer, 517 U.S. at 632 (holding equal protection was violated by a Colorado Constitutional amendment which prohibited all state action designed to prevent discrimination against homosexual persons). "Fundamental rights" are determined based on whether the right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of our civil and political institutions.'" Griswold, 381 U.S. at 493. Groups of individuals are classified as occupying a "suspect class" for purposes of equal protection analysis based on whether they have been historically discriminated against, or have an "immutable" trait, or whether they have historically lacked political power. See Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987) (applying these factors to determine whether a statute affected a suspect class).

Where a law affects a fundamental right or employs a suspect classification, courts subject that law to "strict scrutiny" review. Strict scrutiny requires that the law be narrowly tailored to serve a compelling government interest, and that there are no less restrictive alternatives available to meet the government's objectives. See, e.g., U.S. v. Paradise, 480 U.S. 149, 167 (1987) (holding that a selection process for law enforcement

officers that temporarily required that fifty percent of promotions to go to black officers was narrowly tailored to serve the compelling governmental interest of eradicating discriminatory exclusion of black officers from positions of leadership). That means that the law must only target the exact source of the problem the government seeks to remedy, and must not affect a fundamental right any more than is required to further the government's necessary objective.

Courts frequently employ another form of review that occupies a middle ground between the extremes of "strict scrutiny" and "rational basis" review, called "intermediate scrutiny." This form of review requires that a law be substantially related to an important government purpose. See Craig, 429 U.S. at 210 (holding that a statute which allowed women over age 18 to purchase beer, but which required that men wait until they were 21, was a sex-based classification that did not survive intermediate scrutiny). Intermediate scrutiny is applied when laws include classifications which are considered "quasi-suspect," such as sex or illegitimacy, and indicative of possible discriminatory intent or effects.

IV. SEVERAL STATE COURTS HAVE FOUND THAT LAWS BANNING SAME-SEX COUPLES TO MARRY VIOLATE CONSTITUTIONAL EQUAL PROTECTION GUARANTEES

A. Hawaii

The history of equality in marriage for same-sex couples in the United States began in Hawaii, whose Supreme Court in 1993 was the first to rule that excluding same-sex couples from marriage was discriminatory. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The Hawaii Constitution explicitly prohibits state-sanctioned discrimination

against any person on the basis of sex. Hawaii Const., A. I, § 5. Likewise, Article 13 of the Constitution of Columbia prohibits "discrimination on the basis of gender." Columbia Const., Ch. I, art. 13.

The statute examined by the Hawaii court restricted marriage to a man and a woman. Hawaii Rev. Stat. § 572-1 (1985). The Hawaii Supreme Court held that the statute contained a sex-based classification that was subject to "strict scrutiny" review on equal protection grounds. The statute was therefore presumed unconstitutional unless the State could demonstrate that the sex-based classification was justified by "compelling state interests" and that it was "narrowly drawn to avoid unnecessary abridgements of constitutional rights." Baehr, 852 P.2d at 48. The Hawaii Supreme Court remanded the case to a lower court to take evidence to determine whether the statute survived strict scrutiny analysis.

After conducting a full trial, the court found that the State's arguments for excluding same-sex couples from marriage lacked merit. Baehr v. Miike, CIV No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. 1996). The State had argued that there was: (1) a compelling interest in protecting the health and welfare of children; (2) a compelling interest in fostering procreation within a marital setting; (3) a compelling interest in securing or assuring recognition of Hawaii marriages in other jurisdictions; and (4) a compelling interest in preventing the increased burden to the State's finances that would result if same-sex couples were allowed to marry. Id. at *3.

At trial, an expert in child development testified that same-sex couples can and often do raise happy, healthy, well adjusted children, and that those parents are generally as fit and loving as heterosexual couples. Id. Another expert in the field of sociology

testified that "the absence of the intent or ability to have children does not weaken the institution of marriage" and that children of homosexual couples would be helped if their families received the stability and social status derived from marriage. Id. at 7.

In light of this testimony, the trial court ruled that the State presented inadequate evidence to establish the legal significance of traditional marriage, and that the public interest in protecting children and families was not adversely affected by allowing same-sex couples to marry. Id. at 18. It declared: "If the government cannot cite actual prejudice to the public majority from a change in the law to allow same-sex marriages . . . then the public majority will not have a sound basis for claiming a compelling, or even a substantial, state interest in withholding the marriage statute from same-sex couples." Id. at *21.

The right of same-sex couples to wed in Hawaii was short-lived, however. In 1998, voters passed an amendment to the Hawaii State Constitution giving the Hawaii legislature the exclusive power to define marriage as limited to a man and woman. Hawaii Const. § 23. In 1999, the Hawaii Supreme Court held that in light of the amendment, the state statute restricting marriage to a man and a woman "must be given full force and effect." Baehr v. Miike, No. 20371, 1999 LEXIS 391, at **6-7 (Haw. Dec. 9, 1999).

B. Massachusetts

While the Hawaii Supreme Court ruled in 1993 that the ability of same-sex couples to marry was subject to judicial review for its discriminatory intent or effects, in 2003, Massachusetts became the first state to actually permit same-sex couples to marry. In Goodridge v. Dep't Public Health, 798 N.E.2d 941 (Mass. 2003), the Massachusetts

State Supreme Court ruled that denying the right of marriage to same-sex couples was unconstitutional under the Massachusetts Constitution. Id. at 969 ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.") Article 1 of the Massachusetts state constitution provides, in relevant part: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Id. at 951; Mass. Const., pt. 1, art. 1. Thus, the equal protection provision of the Massachusetts Constitution largely mirrors Article 13 of the Colombian Constitution. The court also noted that the Massachusetts Constitution is "if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life." Id. at 948-49.

The State of Massachusetts argued that because sexual orientation should not be considered a suspect class, rational basis was the proper standard of review. See id. at 961. Without necessarily agreeing with this proposition, the Massachusetts Supreme Court found that the State's marriage ban for same-sex couples did not even satisfy rational basis review. Id.

The court rejected three rationales offered by the State for prohibiting same-sex couples from marrying: the state's interest in the promotion of procreation, child welfare, and the potential impact on the State's finances. As to the first rationale, the court concluded that denying the right to marry would not provide "a favorable setting for procreation" because it is the "exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil

marriage." Id. at 961, 962. As to the State's second point, the court found that allowing same-sex couples to marry would not ensure the "optimal settings for child rearing" because the exclusion of this right "prevents children of same-sex couples from enjoying the immeasurable advantages which flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'" Id. at 961, 964. The court also found that "it cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of state benefits because the state disapproves of their parents' sexual orientation." Id. at 964. Finally, the court concluded that even if individuals in same-sex relationships are less financially dependant on one another than heterosexual relationships (and therefore pose a potentially a greater burden to the State), marriage laws "do not condition receipt" of financial benefits on a "demonstration of financial dependence on each other;" and heterosexual couples are permitted to marry regardless of whether they mingle their finances or actually depend on each other for support. Id. at 961, 964.

The court could find no reasonable relationship between disqualifying same-sex couples from marrying and protecting the public's health, safety, and general welfare, and concluded that legal restrictions against same-sex couples from entering into marriage are only rooted in "persistent prejudices" against homosexuals. Id. at 968. The court found that as "a public institution and a right of fundamental importance, civil marriage is an evolving paradigm" whose boundaries have expanded throughout the years, and that the State failed to articulate a constitutionally valid justification for limiting civil marriage to opposite-sex unions. Id. at 967-68.

Massachusetts began allowing same-sex couples to marry on May 17, 2004.

C. California

In 2008, California joined Massachusetts when its highest court found that restricting same-sex couples from marriage was unconstitutional. The equal protection clause of California Constitution is closely modeled after the United States Constitution, and states that "a person may not be . . . denied equal protection of the laws." Cal. Const., art. 1, § 7. In this way, it is less explicit in its constitutional guarantees than the Constitution of Columbia.

In In re Marriage Cases, 43 Cal. 4th 757 (2008), the California Supreme Court determined that gay persons qualified as a suspect class under the equal protection provisions of California's Constitution after the State conceded that sexual orientation is a characteristic that bears no relation to a person's ability to perform or contribute to society, and is associated with pernicious discrimination for a characteristic that is immutable. Id. at 840-42. Citing the long history of discrimination against gay and lesbian people in California, the court found that "sexual orientation is a characteristic . . . that is associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities." Id. at 841. It added that, "[o]utside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility, and such immediate and severe opprobrium, as homosexuals." Id.

In considering the traditions and history of the right to marry, the court acknowledged that marriage described a union of "undeniable symbolic importance" which was "unreservedly approved and favored by the community." Id. at 845. That acknowledged societal stature led the court to conclude that the denial of the right of

same-sex couples to marry amounted to unequal treatment, stating that "if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions." Id. at 853-54. Reserving the status of marriage for opposite sex couples "may well have the effect of perpetuating a more general premise . . . that gay individuals and same sex couples are in some respects 'second-class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite sex couples." Id at 784-85. The court, therefore, struck down California's statutory language limiting marriage to one man and one woman. Id at 857.

In 2008, a controversial amendment to the California Constitution known as Proposition 8 passed, explicitly prohibiting the State from performing marriages between same-sex couples. Though marriages between same-sex couples entered into in California before Proposition 8 passed remain valid, see Strauss v. Horton, 46 Cal.4th 364 (2009), the State ceased issuing marriage licenses to same-sex couples after the passage of Proposition 8.

However, the longevity of Proposition 8 remains unclear. In May 2009, two same-sex couples in California filed a lawsuit in a United Stated federal court challenging the constitutionality of Proposition 8 under the Fourteenth Amendment to the United States Constitution. See, Perry v. Schwarzenegger, Case No. 09-CV-2292 (VRW) (N.D. Cal.). The case went to trial in January 2010, and a decision is still pending.

D. Connecticut

In 2008, in Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008), Connecticut's highest court struck down its statutory provisions prohibiting marriage between same-sex couples. The Connecticut Supreme Court held that "in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm." Id. at 412.

The Connecticut court based its decision on Sec. 20 of the Connecticut Constitution, which states that "no person shall be denied equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry, or national origin." Conn. Const., § 20. The Connecticut Constitution is therefore similar to the Constitution of Columbia in prohibiting discrimination. See Columbia Const., ch. 1, art. 13 (prohibiting discrimination on the basis of "gender, race, national or family origin, language, religion, political opinion, or philosophy.")

Noting that the Connecticut Constitution "in some instances provides greater protection than that provided by the federal constitution," the court found there was a cognizable constitutional claim because the legislature had created "an entirely separate and distinct legal entity for same sex couples even though it could have made those same rights available to same sex couples by permitting them to marry." Id. at 418, 420.

The State contended that rational basis review was the appropriate standard of review because under Connecticut's civil union law, the plaintiffs were entitled to all the

rights married couples enjoy. The State asserted that the law did not discriminate between men and women, and argued that the law was not discriminatory because gay persons were not prohibited from marrying, so long as they married a person of the opposite sex. Id. The court found that sexual orientation met the requirements of a quasi-suspect classification because attraction to persons of the same sex was an immutable characteristic and gay persons were a minority group that had a relative lack of political power. Id. at 429, 431-32. The court found that intermediate scrutiny review was appropriate, and required the State to show that the denial of the right of same-sex persons to marry served important governmental objectives and that the means employed were substantially related to the achievement of those objectives. Id. at 475.

The State argued that the restricting same-sex couples from marriage promoted the uniformity and consistency of the laws with other jurisdictions, and preserved the traditional definition of marriage as between one man and one woman. Id. at 477. Analyzing whether the reasons underlying the traditional statutory scheme were sufficient under Connecticut's constitutional requirements, the court disagreed that the traditional nature of marriage as between a man and a woman should prevent same-sex couples from being allowed to marry, reasoning that "although it is true that authorizing same sex couples to marry represents a departure from the way marriage historically has been defined, the change would *expand* the right to marry without any adverse effect on those already free to exercise the right." Id. at 474. Indeed, "to say that discrimination is traditional is to say only that the discrimination has existed for a long time." Id. at 478.

The court concluded that granting same-sex couples the right to marry "will not alter the substantive nature of the legal institution of marriage," and found that the

exclusion of same-sex couples from the ability to marry works a "real and appreciable harm" on those couples and their children. Id. at 475. Without any sound justification given by the State to deny same-sex couples the right to marry, "'preserving the traditional institution of marriage,' is just a kinder way of describing the [s]tate's moral disapproval of same-sex couples." Id. at 480. Because moral disapproval alone is not sufficient to promote the benefit of one group over another, the State of Connecticut failed to establish an adequate reason to justify the statutory ban marriage, which the court held to be unconstitutional under the Connecticut Constitution's equal protection provision.

As a result of Kerrigan, same-sex have been allowed to marry in Connecticut since November 12, 2008. On October 1, 2010, all Connecticut civil unions will automatically convert to marriages.

E. Iowa

In 2009, the Iowa Supreme Court overturned Iowa's laws preventing same-sex couples from marrying, citing the equal protection clause of the Iowa Constitution. Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009) (finding that "a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class – their sexual orientation"). Iowa's constitutional guarantee of equal protection is not as explicit as that of Columbia's, and asserts only that "all laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const., art. I, § 6. Under that constitutional provision, the Iowa court

applied intermediate scrutiny review after examining the history of discrimination against homosexual persons, the immutability of sexual orientation, and the relative political powerlessness of gay and lesbian people. Id. at 896.

The State advanced several objectives supporting the marriage statute, including support for the "traditional" institution of marriage, the "optimal procreation and rearing of children, and financial considerations." Id. at 897. The court rejected the State's argument based on "tradition" as circular reasoning: discrimination against suspect classes is almost by definition traditional, but equal protection analysis is to a large degree aimed at overturning traditions that are discriminatory. Id. at 898. The court also concluded that a rationale based on the supposed optimal raising of children was not a sufficient justification for the ban on same-sex couples from marriage, because in addition to evidence that gay persons can be and are loving parents, the Iowa statute permitted marriage between heterosexual persons who were child abusers, sexual predators, parents who neglected child support, and violent felons. Id. at 900. In addition, not all couples choose to raise children, but they are nonetheless permitted to marry. Id. The State's argument regarding financial considerations also failed because, although the State might save money denying marriage benefits to same-sex partners, it could also save money by denying those benefits to any other minority group. The court found that such classifications "offend our society's collective sense of equality." Id. at 902-03.

The Iowa Supreme Court also noted its historic obligation to protect the rights of individuals, including rights that "have not been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to

the passage of time." Id. at 876. Equal protection under the Iowa Constitution is violated when the legislature excludes "a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification." Id. at 906.

As a result of the decision in Varnum, same-sex couples have been permitted to marry in Iowa since April 3, 2009.

V. SOME COURTS HAVE FOUND THAT PROHIBITIONS AGAINST MARRIAGE FOR SAME-SEX COUPLES ARE CONSTITUTIONAL UNDER RATIONAL BASIS REVIEW

The level of review a court applies in reviewing challenges to marriage prohibitions under equal protection analysis plays a significant role in the ultimate determination. Because rational basis review only requires that a challenged statute reasonably relates to a legitimate government purpose, a statute analyzed under this standard is more likely to be found to be valid. Though the Massachusetts Supreme Court held in Goodridge that Massachusetts could not justify prohibiting same-sex couples from marriage even if rational basis review applied, 798 N.E.2d at 961, several other states that have applied rational basis review have concluded otherwise.

In Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006), the New York Court of Appeals held that the State's Constitution did not require recognition of marriages between same-sex couples, but neither did it prevent the state's legislature from granting that recognition if it chose to do so. The court found that rational basis was the proper form of review because the statute did not discriminate against men or women as a class, and because the characteristic of sexual orientation was relevant to the State's interests regarding marriage. Id. at 10-11.

The court reasoned that the legislature could have rationally decided that for the welfare of the children, it was more important to promote stability in opposite-sex than same-sex couples. Unlike same-sex couples, opposite-sex couples could become parents by "accident or impulse," and the State could therefore legitimately offer an inducement in the form of marriage benefits to those couples to promote familial stability. Id. at 7. Same-sex couples, on the other hand, generally had to go to great lengths and take deliberate action to produce children, who, as a result, were more likely to be raised in stable environments. Id. The court also said that the legislature could also have adopted what it called the "commonsense" view that a child should be raised by both a mother and a father. Id. at 8-9. Furthermore, in response to the plaintiffs' argument that the statute was irrationally over-inclusive because it allowed childless opposite-sex couples to marry, the court found that a legislature that believed that the institution of marriage was primarily for the benefit of children could rationally find that "an attempt to exclude childless opposite-sex couples . . . would be a very bad idea." Id. at 12-13.

In 2006, the Maryland Supreme Court used rational basis review to hold that a Maryland statute restricting marriage to opposite-sex couples was valid under the equal protection clause of its constitution because the State's interest in safeguarding an environment most conducive to procreation was legitimate, and because same-sex marriage was not so deeply rooted in the history and tradition of Maryland as to be a fundamental right. Conaway v. Deane, 932 A.2d 571 (Md. 2007).

That same year, the Washington Supreme Court held that the State's "Defense of Marriage Act," which restricted marriage to between a man and a woman, survived rational basis review because the legislature could rationally believe that marriage

furthered the State's legitimate interest in promoting procreation and encouraging stable families where children are raised by their biological parents. Andersen v. King County, 138 P.3d 963 (Wash. 2006). The court, however, noted the hardships that same-sex couples face and indicated that the legislature "may want to re-examine the impact of marriage laws on all citizens of this state." Id. at 990. In 2009, Washington enacted an "everything-but-marriage" bill granting same-sex partners in that State the same rights, benefits, and protections granted to married couples. Wash. Rev. Code Ann. §26.60.010, *et seq*.

In 2006, the New Jersey Supreme Court found that sexual orientation was a suspect classification, but applied a standard of review that was similar to rational basis. Lewis v. Harris, 908 A.2d 196 (N.J. 2006). The Court held that under that test, a statute that granted some, but not all, of the rights and benefits of marriage to same-sex couples did not satisfy New Jersey's constitutional equal protection guarantees. Id. The court declared that the "unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated," and concluded that there was no "legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages same-sex couples." Id. at 200, 217-188.

Because its decision bore on the rights and benefits of marriage, and not the institution of marriage itself, the Court held that the Legislature could either amend marriage laws to permit marriage between same-sex couples, or provide for the establishment of civil unions, which granted fully equal spousal rights to same-sex couples. Id. at 221. Later that year, the New Jersey Legislature enacted a statute that provided for civil unions. N.J. Stat. Ann. §§ 37:1-31. On March 18, 2010, however,

motion was filed on behalf of the Lewis plaintiffs in the New Jersey Supreme Court arguing that the civil union remedy enacted by the legislature does not fulfill the New Jersey Constitution's guarantee of equality or the New Jersey Supreme Court's 2006 equal protection ruling. A decision on that motion is currently pending.

Additionally, in 2005, the Oregon Supreme Court in Li v. State, 110 P.3d 91 (Or. 2005), held that an Oregon County did not have authority to issue marriage licenses to same-sex couples, because marriage was limited to opposite-sex couples pursuant to a voter-approved amendment to Oregon Constitution. The Oregon Constitution did not address whether the County's actions violated Oregon's equal protection standards.

VI. CONCLUSION

Many of the states discussed in this brief, whose equal protection provisions largely mirror that of the Columbian Constitution, have had their highest courts recognize that the denial of the right to marry to same-sex couples offends traditional notions of equal protection under the law. The usual arguments offered for opposing same-sex marriage, such as protecting heterosexual marriage or the "institution" of marriage, or protecting children by preventing their parents from marrying, have not withstood review by many of the highest courts that have examined this issue at the state level. For the foregoing reasons, *amicus curiae* respectfully urges the Constitutional Court to find that the provisions of Article 113 of the Colombian Civil Code and Article 2 of la Ley 294 de 1996, defining marriage as between a man and a woman, violate the fundamental constitutional principle of equality before the law.

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