A HEIGHTENED SCRUTINY FOR SEXUAL ORIENTATION UNDER THE EQUAL PROTECTION CLAUSE

by

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ABSTRACT

Equality was explicitly written in the Fourteenth Amendment to the United States Constitution, promising equal treatment. Even though many states recognize lesbians, gays, and bisexuals' rights, LGB individuals across the country still remain vulnerable due to minimal judicial scrutiny. The article will explore the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the three standards of judicial review established by the Supreme Court, and analyze how they pertain to sexual orientation. This article further argues that sexual orientation meets all Supreme Court's requirements for suspect classification. Accordingly, the Supreme Court should use the highest level of judicial review over LGB challenges and in order to protect the rights of the LGB individuals because these individuals belong to a discrete and insular minority with a long history of discrimination and political powerlessness. Sexual orientation further displayed immutable characteristics that are irrelevant to an individual's ability to participate and contribute to society.

This thesis will only discuss sexual orientation, which is an enduring pattern of romantic or sexual attraction toward a person. The term "LGB individuals/community" in refers to all sexual orienation - including gay, lesbian, bisexual, pansexual, and several others.

Keywords: *discrimination, equal protection, sexual orientation, discrete and minority, politically powerless, immutability, strict scrutiny, equality, advancement, LGBs.*

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INTRODUCTION

On June 26, 2015, in Obergefell v. Hodges, the United States Supreme Court had officially recognized the fundamental right to marriage and extending it to same-sex couples. It further requires states to issue and recognize same-sex marriages that were legally formed in other states. A few years later, another major case was decided in Bostock v. Clayton County, where the Court decided that sexual orientation is protected from employment discrimination under the Title VII of the Civil Rights Act of 1964.

Though the two cases above are significant strides for the LGBs' rights, equality, and advancement, an important question was left unanswered; neither of the Supreme Court cases has addressed nor declared the proper level of scrutiny for sexual orientation. The determination of level scrutiny for sexual orientation is critical because, over the years, the suspect classification and the application of strict scrutiny have allowed "race" to secure equality and protection in a way that LGB people cannot. In this thesis, I argue that the United States Supreme Court should grant sexual orientation suspect classification.

The Supreme Court has legalized same-sex marriage across the country, extending the protection to sexual orientation under the Title VII of the Civil Rights Act of 1964, and the Equality Act being passed under the Biden Administration is being anticipated. Still, classifying sexual orientation under suspect classification provides the LGB community an extra layer of protection to ensure that any discriminatory law in the future against sexual orientation would be immediately struck down.

Another reason why the question of classification for sexual orientation requires an answer is that many federal appeals courts are substituting various judgments when determining

cases that relate to sexual orientation. For example, the United States Courts of Appeals for the Second Circuit has classified sexual orientation as quasi-suspect classification, and thus, subject to intermediate scrutiny. The United States Court of Appeals for the Ninth Circuit permitted sexual orientation under heightened scrutiny but did not clarify whether it means intermediate or strict scrutiny. Lastly, the United States Court of Appeals for the Sixth Circuit subject sexual orientation to rational basis review. The split decisions from all the Circuits will continue as sexual orientation classification remains unanswered. The outcomes of civil cases regarding sexual orientation should be definitive rather than depending on where it is decided. (Perry, 2015) Accordingly, the United States Supreme Court should declare sexual-orientation as a suspect class so that laws that discriminate against people based on sexual orientation should be subject to strict scrutiny.

This article will explore the origin and application of the Equal Protection Clause. It will explain the three standards of judicial review established by the United States Supreme Court and analyze how they pertain to sexual orientation. The article also argues that sexual orientation meets all of the requirements in equal protection cases for suspect classification. It will address the history of LGB discriminations and review the LGB rights movement's advancement through precedent court cases involving sexual orientation. Lastly, it will explain why sexual orientation is considered a "discrete and insular minority," with political powerlessness and immutable characteristics that are irrelevant to an individual's ability to participate and contribute to society.

EQUAL PROTECTION CLAUSE

The Fourteenth Amendment to the United States Constitution contained three specific provisions; one of which is the Equal Protection Clause, which states "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." (U.S. CONST. amend. XIV). The Clause guarantees the equality of legal and social status to all United States citizens by prohibiting the state governments (there has been times where the Clause is read into the Fifth Amendment to prevent the federal government) from passing laws that discriminate against similarly situated group, treating them as members of "inferior castes", "nonparticipants.", and against the "imposition of stigma" (Kwapisz, 2011).

Even though the Clause was initially proposed in 1866 and enacted in 1868, just shortly after the Civil War, to stop states from discriminating against African Americans and ensure due process. Until today, the Equal Protection Clause remains one of the most important provisions for protecting civil rights - as it is used to combat discriminatory policies, laws, and governmental actions. One of the most notable examples of the Clause serving as a foundation for legal anti-discrimination measures in the United States is Brown v. Board of Education of Topeka 347 U.S. 483 (1954). In Brown, the Supreme Court addressed whether segregation of children in public schools on the basis of race violated the Fourteenth Amendment to the Constitution. In a unanimous decision, the Court concluded that "Separate educational facilities are inherently unequal." Because racial segregation in public school can generate feelings of inferiority and hindered the opportunity to succeed in life if denied an adequate education, therefore, the doctrine "separate but equal" violated the Equal Protection Clause. Over the years, the U.S. Supreme Court continues to invoke the Equal Protection Clause to invalidate laws that discriminate against specific groups. (Miller, n.d.)

THREE LEVELS OF SCRUTINY & APPLICATION

In the 1970s and 1980s, the Supreme Court has established three different scrutiny levels in deciding whether a particular law or action violates the Equal Protection Clause. The term "scrutiny" refers to how the Supreme Court examines a government's purpose and use of classification when passing a particular law. The three standards of review are rational basis review, intermediate review, and strict scrutiny.

Many laws and ordinary governmental regulations are assessed under the "rational basis review." – which is the least searching out of the three levels of review because it can be used to avoid a real analysis of a law (ACLU, n.d.). Here, for the Court to uphold the law's constitutionality, two questions must be answered 1) Whether or not that state has a reasonable purpose for passing such a law? and 2) Is the law designed to achieve a legitimate governmental interest? Since the Courts are not limited to consider the actual purposes behind a government law or action, a vast majority of legislation challenged under the rational basis will be sustained and upheld. It's important to note that there have been occasions where the Court used rational basis review to invalidate laws, for instance, Romer v. Evans - which will be discussed in the following sections.

The intermediate review level is also referred to as "intermediate scrutiny" or "heightened scrutiny." (ACLU, n.d.) It is a middle-tier level formed by the quasi-suspect classes - gender and illegitimacy. Unlike rational basis review, intermediate review subjects governmental action to more stringent inspection but less searching than strict scrutiny. When the Courts apply intermediate scrutiny, they determine whether the law or governmental action is substantially related to the achievement of an important governmental interest. (Subscript Law, 2021)

Intermediate review is commonly used cases challenging classifications on the basis of sex, for example, in Craig v. Boren, 429 U.S. 190 (1976).

Strict scrutiny is the highest standard of review. It's generally applied when a law targets specific groups of people, so-called suspect classifications - race, national origin, religion, and alienage, or when a law violates an individual's fundamental rights – for example, the right to vote, the right to marry, the right of individual privacy, the right to procreate, and several others rights. Under strict scrutiny, it's required that the government show a "compelling purpose for the distinction drawn and prove that such a classification is necessary to achieve that purpose." Since this level requires a thorough examination, many governmental actions and laws failed to uphold its constitutionality under it. (Parker, 2015)

The determination of suspect class is an inexplicit endeavor as there are no definitive criteria and the emphasis on these requirements can shift depending on the cases and judges. Nonetheless, in Lyng v. Castillo, Justice John Paul Stevens outlined the criteria for a suspect class in his majority opinion. Justice Stevens suggested that a suspect or quasi-suspect class must 1) [belong] to a discrete and insular minority, 2) [was] on the receiving end of social stigmatization and/or has been historical discrimination, 3) [is] united by an immutable characteristic that neither be controlled nor affects a person's ability to contribute to society, and 4) frequently lacked effective representation in the political process. (Parker, 2015)

The determination of which standard of review a court used is crucial for discrimination claims against suspect classes or claims for violating fundamental rights. Customarily, when strict scrutiny is applied, the statute in question has a high likelihood of being overturned or declared unconstitutional by the Supreme Court. There is a fifty-fifty percent chance of the

statute being upheld or struck down when the intermediate review is applied, and under the rational basis, a law's constitutionality is usually upheld.

The Supreme Court has yet to issue a definitive statement on the classification for sexual orientation. As the classification remains nebulous, discriminating laws against LGB individuals are often analyzed under rational basis or intermediate scrutiny. The following sections will set forth the evidence that sexual orientation meets all the burden for suspect classification established by the Supreme Court. Hence, it should be reviewed under strict scrutiny.

DISCRIMINATIONS & ADVANCEMENT IN LGB RIGHTS MOVEMENT

This section will detail several significant court cases that changed LGB rights over the years. It will outline the timeline and history of discrimination LGB individuals have faced and continues to face throughout history in various aspects of their lives.

1958: United States Supreme Court - Olsen, Inc. v. Olesen, 355 U.S. 371 (1958)

Olsen, Inc. v. Olesen, 355 U.S. 371 (1958) is the first U.S. Supreme Court ruling to deal with homosexuality. In Olsen, the postmaster, Otto K. Olesen ordered federal postal authorities to seize a magazine intended for homosexual audiences because it violated obscenity laws, quoting "obscene, lewd, lascivious and filthy…non-mailable." The publisher brought a lawsuit claiming the government violated the First and the Fourteenth Amendments. The District Court ruled in favor of the government because the magazine contained homosexual pulp romance stories and poems that would arouse gay audience. The Ninth Circuit Court of Appeals upheld the lower Court's ruling in a unanimous decision. In a one-sentence opinion, the Supreme Court reversed the circuit court's decision. (Mezey, n.d.)

1971-1974: First Few Cases Seeking Same-Sex Marriage Rights

1971: Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971-1972)

In 1970, Jack Baker and his partner Michael McConnell were denied a marriage license by the Hennepin County clerk because they couples were of the same-sex. Petitioner Baker filed against the Hennepin County District Court because there was an absence of express statutory prohibition against same-sex marriage in Minnesota, and such denial would violate the Constitution. The district court denied their motion without comment. The Minnesota Supreme

Court affirmed the district court's decision via a unanimous rejection. Petitioner Baker appealed to the U.S. Supreme Court on October 10, 1972. Accordingly, the Court dismissed the case, writing "the appeal is dismissed for want of a substantial federal question." (Shirey, 2020)

1973: Jones v. Hallahan, 501 S.W. 2d 588 (Ky. 1973)

The case involves two women seeking review of a judgment by the Jefferson Circuit Court after their marriage license request was denied. The Court of Appeals of Kennedy, citing marriage as "A state of being marriage, or being united to a person or persons of the opposite sex." And that marriage is defined as "the legal union of a man with a woman of life." The Court denied the two women's request due to their "own incapability of entering into a marriage as that term is defined." (501 S.W.2d 588)

1974: Singer v. Hara, 522 P.2d 1187 (Wash.1974)

Here, a couple – John Singer and Paul Barwick, filed a lawsuit after being denied a marriage license. The couple claimed that denying same-sex marriage violated Washington State's new Equal Rights Amendment. Applying the rational basis test for review because homosexuals were not a suspect class. The Washington Court of Appeals applied and affirmed the trial court's decision, holding that there was no violation of the Washington Equal Rights Amendment as it only applies to individuals whose rights were denied on the basis of sex. (522 P.2d 1187)

1896: United States Supreme Court - Bowers v. Hardwick, 478 U.S. 186 (1986)

Bowers v. Hardwick, 478 U.S. 186 (1986) is the first major U.S. Supreme Court case relating to gay rights. Here, two gay men were arrested in their home for performing consensual sex and charged for violating Georgia's statute prohibiting all types of sodomy. The respondent, Hardwick, challenged the constitutionality of the statute in Federal District Court. The Court of Appeals of the Eleventh Circuit held that Georgia's statute prohibiting sodomy is unconstitutional as it violated the respondent's fundamental rights. But the majority of the U.S. Supreme Court Justices voted against gay rights and refused to strike down the state's sodomy statute.

The majority opinion states, "the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy." It went on saying, "Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to supports the law." (Cornell Law, n.d.) The Court's unwillingness to grant protection for the LGB individuals in the face of a discriminatory statute raises a significant setback for the LGB rights movement and the fundamental right to privacy and intimacy. The Court continued to uphold the sodomy law for nearly 20 years before overturning it in Lawerence v. Texas, 539 U.S. 558 (2003).

1993: Act of Congress – "Don't Ask, Don't Tell" (1993-2011)

In 1993, former President Clinton signed a policy passed by Congress known as "Don't Ask, Don't Tell," or DADT. The Act states, "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion which are the essence of military capability."

This policy directed that military personnel and commanding officers "don't ask" about service members' sexual orientation, "don't tell" nor discuss one's' sexual orientation, "don't pursue" nor engage in sexual activity, and don't harass" military personnel based on sexual orientation. (Tikkanen, n.d.)

Although President Clinton intended to end the U.S.'s military ban on homosexuals, the DADT policy was heavily criticized for restricting military personnel's sexual orientation and their lifestyles while making little changes to the U.S.'s military's tradition of banning homosexuals. It's estimated that more than 100,000 U.S. servicemen and servicewomen were discharged over the years with status "other than honorably" or "dishonorably" because of their sexual orientation. (Adams, 2020) Military discharge status heavily affects a veteran's eligibility for veteran benefits. Any statutes other than "honorable discharge" or "general discharge under honorable conditions" can inhibit a veteran's compensation, pension, education, home loan, and insurance benefits.

It was not until 2010 that the House of Representatives and the Senate voted to repeal the policy. President Barack Obama signed the legislation on December 22, 2011, and officially ended the DADT policy.

1996: United States Supreme Court - Romer v. Evans, 517 U.S. 620 (1996).

Romer v. Evans, 517 U.S. 620 (1996) is the first Supreme Court case that advances gay rights by applying the Equal Protection Clause. In Romer, many conservatives in Colorado were outraged when several liberal cities within its state began passing anti-discrimination laws that treated discrimination on the basis of sexual orientation the same as discrimination on the basis of race, sex, religion, national origin, or disability. (Miller, 2017) Conservative voters then

amended the state constitution (Amendment 2), which repealed and prohibited all legislative, executive or judicial actions designed to prevent discrimination based on sexual orientation. (Kwaspisz, 2011) LGB individuals filed a lawsuit challenging Amendment 2's constitutionality.

In determining the decision, the Supreme Court of Colorado applied a strict scrutiny test to strike down the state constitutional amendment. The U.S. Supreme Court granted certiorari and affirmed the judgment, declaring the state constitutional amendment violated the Equal Protection Clause. In the majority opinion, the Court wrote, "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."

The Court further states, "Amendment 2 classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." (Galvin, 2019) However, the 6-3 majority of the U.S. Supreme Court applied a rational basis test in their decision because classification based on sexual orientation does not require protection status under the Equal Protection Clause. Romer was undoubtedly a major victory for the gay rights movement, yet, the Court did not address what standard of review should be used for future discrimination cases against sexual orientation.

Defense of Marriage Act (DOMA)

Congress enacted the Defense of Marriage Act (DOMA) in the 104th United States Congress and signed into law by President Bill Clinton on September 21, 1996. DOMA's Section 3 – Definition of marriage, the law states "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word `marriage' means only a legal union between one man and one

woman as husband and wife, and the word `spouse' refers only to a person of the opposite sex who is a husband or a wife." Under this section, same-sex married couples were not recognized for purposes under federal laws – barring them from federal protections, spouse's employment benefits, rights of inheritance, filing of joint tax returns, the marriage itself and several others. (Cornell Law, n.d.) Moreover, the Act allowed states to refuse and deny same-sex marriages granted under other states or countries' laws.

2003: United States Supreme Court - Lawrence v. Texas, 539 U.S. 558 (2003)

Like Bowers v. Hardwick, 478 U.S. 186 (1986), the Lawrence case involved two men being discovered while engaging in sexual intercourse at their home in Texas. During that time, Texas has a statute that specifically prohibited only homosexual sodomy. The two men were arrested and convicted of violating Texas's sodomy statute. The State Court of Appeals basing its decision on Bowers held that Texas's statute prohibiting sodomy was not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The case reached the U.S. Supreme Court in 2003, where the majority overturned Bowers, by declaring "Bowers was not correct when it was decided, and it is not correct today." and held that Texas's sodomy law to be unconstitutional because it violated the constitutional right of privacy and the Equal Protection Clause.

In his opinion, Justice Kennedy noted, "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." (539 U.S. at 575) Justice O'Connor also noted that "A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review."

(539, U.S. at 585 (2003)) It's important to note that even though Lawrence was a victory for homosexuals, it did not provide an equal protection victory as the Court has avoided determining the standard of review.

2015: United States Supreme Court - Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) was decided on June 26, 2015, and it's currently one of the most influential and historic gay right ruled by the U.S. Supreme Court. The petitioners included 14 same-sex couples and two-men who same-sex partners has deceased, filed against their respective Federal District Courts (Kentucky, Ohio, Michigan, and Tennessee). The questions the Court must determine here are 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? (Wikipedia, n.d.) All of the District Court ruled in petitioners' favor, but the Court of Appeals for the Sixth Circuit consolidated the cases and reversed the lower courts' decisions. (Cornell Law, n.d.) The petitioners sought and granted certiorari in the U.S. Supreme Court.

In a 5-4 decision in favor of the petitioners, the Court rested its decision on the fundamental right to marry, and held "The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 3–28."

Justice Kennedy delivered the majority's opinion, here, he emphasized the four main reasons why marriage is a fundamental right, quoting [1] "The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to

individual dignity and autonomy, including intimate choices defining personal identity and beliefs." The Court based its decision on relevant precedent cases like Loving v. Virginia, 388 U.S.1, Turner v. Safley, 482 U.S. 78, and Baker v. Nelson, 409 U.S. 810, which all indicated that the Constitution protects the right to marry. Justice Kennedy stated [2] "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation…There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." Here, the Court acknowledged that every individuals, same-sex couples or not, deserves the to "enjoy intimate association."

[3] Marriage can "safeguard children and families thus drawing meaning from related rights of child-rearing, procreation, and education." Children of same-sex parents can suffer the "stigma of knowing their families are somehow lesser" if there's no "recognition, stability, and predictability" in a marriage. Not only did the Court acknowledge that LGB individuals are capable of having a family but also being parents. And lastly, [4] "marriage is a keystone of the Nation's social order." All civilization and progress are built upon the foundation of marriage, and there's no difference between opposite-sex or same-sex marriages in "states conferring benefits and responsibilities upon marriages." (Perry, 2015)

One major issue arises from the Court's decision, on precedent cases where a government action infringes upon a fundamental right, the Court generally subject such action under strict scrutiny - which requires the state to prove that its action was "narrowly tailored to a compelling government interest." However, the Supreme Court has never examined the state under such justifications in Obergefell. The Court also avoided the classification of sexual

orientation and the proper application of standard of review levels for sexual orientation. (Perry, 2015)

2020: United States Supreme Court – Title VII of the Civil Rights Acts of 1964

On June 15 2020, the U.S. Supreme Court has officially extended the prohibition on employment discrimination based on sex to protect sexual orientation and gender identity under the Title VII of the Civil Rights Act of 1964. The decision arises from three cases – Bostock v. Clayton County, Altitude Express v. Zarda - gay men were fired because of their sexual orientation and the Court must determine whether or not discrimination based on sexual orientation violates the ban on sex discrimination found in Title VII., and R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity. In its single opinion, the Court held that "In Title VII, Congress adopted the broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee…An employer who fires an individual merely for being gay or transgender defies the law." (Chemerinsky, 2020)

The decision made under Bostock v. Clayton County is a significant affirmation of LGBT rights in the United States since Obergefell v. Hodges in 2015. Prior to the decision, LGB job discrimination was still legal in about half of the country, which means millions of Americans who identify as LGB had no employment discrimination protection. This is a huge success within the LGB community as it could advance LGBT's rights not just in employment but in many areas – housing, public accommodations, credit.

2021: Relevant Issues

The Movement Advancement Project's map – an independent organization that helps educate and support LGBT movement – indicating LGB non discriminatory state laws across the country in three areas is detailed below.

1. **Housing Nondiscrimination Laws –** which protect against unfair eviction, housing denial, higher charging rates, refusal of the ability to rent or buy housing on the basis of sexual orientation or gender identity.

- State law that explicitly prohibits discrimination based on sexual orientation. (22 states + the District of Columbia)
- State explicitly interprets existing prohibiting on sex discrimination to include sexual orientation. (6 states)
- State law explicitly prohibits discrimination based on sexual orientation only. (1 state)
- No explicit prohibitions for discrimination based on sexual orientation. (21 states)

2. **Public Accommodation Nondiscrimination Laws** – which protect against unfairly refused service, denied entry to, discriminations in public places based on sexual orientation or gender identity.

- State law that explicitly prohibits discrimination based on sexual orientation. (21 states + the District of Columbia)
- State explicitly interprets existing prohibiting on sex discrimination to include sexual orientation. (5 states)
- State law explicitly prohibits discrimination based on sexual orientation only. (1 state)
- No explicit prohibitions for discrimination based on sexual orientation. (23 states)

3. **Credit and Lending Nondiscriminatory Laws** – protect against unfairly denied credit and lending services on the basis of sexual orientation or gender identity.

- State law that explicitly prohibits discrimination based on sexual orientation. (15 states)
- State explicitly interprets existing prohibiting on sex discrimination to include sexual orientation. (1 state)
- No explicit prohibitions for discrimination based on sexual orientation. (35 states)

As noted above, the prohibition on employment discrimination based on sex is extended to sexual orientation under the Title VII of the Civil Rights Act of 1964. Even so, millions of LGB Americans are not fully protected in areas such as housing, public accommodations, and crediting and lending services. The U.S. Supreme Court is powerful, and it's the decision to grant suspect classification to sexual orientation can secure all the protections listed above.

Lesbian, gay and bisexual people in the United States have encountered extensive and wide-spread prejudice, discrimination and violence throughout much of history. (A.P.A., 2008) Sexual orientation discrimination can take place in different forms, for example, hate crime - in a recent 2020 F.B.I. Hate Crimes Report, statistics indicate that approximately 16.7% of hate crimes were targeted toward sexual orientation, the largest category after race and religion. According to the Human Rights Campaign, the statistics are likely to represent only a fraction of hate crime as such crimes are not mandatory to report. Mass media has also portrayed LGB members negatively throughout history by portraying gay people as queers, perverts, criminals, predators, child molesters, deviants, psychopaths, monsters, freaks, pansies, etc. (Galvin, 2019). Discrimination does not stop there.

LGBs community also faced enormous discrimination during the HIV/AIDS pandemic. During its early days, HIV/AIDS was associated with being gay, lesbian, and bisexual. In 1990,

the United States banned immigration laws that prevented homosexuals from entering the country; this ban on H.I.V. positive individuals were later outlawed in 2009.

Under Former President Trump Administration

After the election in 2016, the LGB community once again found themselves struggling to gain protections and equality under President Donald Trump's "systematic effort to undo the progress [to expand opportunities and advance equality and justice for LGB community] made by former President Obama" (Biden, n.d.)

Despite the Supreme Court's recognition of same-sex marriage, the Trump Administration continuously showed hostility and discrimination toward the LGB community. The Human Rights Campaign has provided an updated list of former President Trump's unprecedented steps to weaken the LGBs protections. It's important to note that the examples described below do not reflect all of the Trump Administration “attack” targeting the LGB community over the years.

The first example is former President Trump's opposition to the Equality Act – a bill that would include both sexual orientation and gender identity as protected class under federal civil rights. Another example is making jokes about former Vice President Pence's anti-gay agenda, stating, "Don't ask that guy – he wants to hang them all." In 2019, the Trump Administration further submitted an amicus brief requesting the Supreme Court to legalize work-place sexual orientation discrimination.

The Lambda Legal - a LGBTQ civil rights group, has reported that nearly 40% of former President Trump's appointed federal appellate judges have various anti-LGB bias records, that range from opposing same-sex marriage to allowing businesses to reject business services to

LGBs individuals. (Avery, 2021) Many information about LGBs rights, recognitions, and equality were eliminated from governmental websites, including the White House's official website. (H.R.C., n.d.) In January 2021, just weeks left of the Trump Administration, the Department of Health and Human Service announced that it would eliminate prohibitions against discrimination, permitting taxpayer-funded agencies to discriminate on the basis of sexual orientation. Millions of L.B.G.s individuals who depend on these services are at risk of losing access to services like – childcare programs, healthcare, homeless shelters, programs for seniors, foster and adoption services, and much more. (Peck, 2021)

Under President Biden Administration

Contrary to former President Trump's administration, there are high anticipations toward expanding LGB rights under U.S. President Joe Biden. President Biden recently issued a presidential memorandum to address his plan to advance LGB equality in America and worldwide. He pledged to protect the LGB individuals from discriminatory laws, support LGB youth, expand access to high-quality healthcare for LGB individuals, ensure fair treatment in the criminal justice system, and advance global LGB rights and development. One of President Biden's legislative priorities is to reverse the discriminatory impacts made under the Trump Administration. (Biden, n.d.)

Some of the first steps taken by President Biden was appointing Pete Buttigieg, the first openly gay person, to serve as U.S. cabinet secretary at the Transportation Department (Savage, Graham, 2021), and promising to nominate and appoint more LGB individuals to positions of officials and judges during his four years term. Another of President Biden's priorities within his

first 100 days in office is to pass the Equality Act, which will ban discrimination against people based on sexual orientation and gender identity.

Several other major pledges includes support same-sex couples in their adoption proceedings, reserve Trump's misused policies through religious exemptions, provide employment, housing, healthcare support and resources for LGB seniors, protect LGB students from sexual assault, harassment and bullying through the Tyler Clementi Higher Education Anti-Harassment act, which will establish a grant program to campus anti-harassment program. (Biden, n.d.)

President Biden's ambitious plan to improve the lives and rights of LGB individuals in America gives hope to millions of gay, lesbian, and bisexual across the county. Even though LGB rights are looking toward expansion and advancement for the next four years, these plans are not set in stone. Over the last decades, the LGB rights have shifted tremendously under the Obama, Trump, and Biden administrations. LGB has never been able to truly secure all of the necessary protections. Hence, suspect classification is necessary for the LGB community to be shielded from future discriminatory laws.

IT'S INDISPUTABLE - LGBs ARE "DISCRETE AND INSULAR MINORITY"

The phrase "discrete and insular minority" was introduced in the United States v. Carolene Products Co., 304 U.S. 144 (1938). Made famous by Justice Harlan Stone, the footnote wrote "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (Encyclopedia, 2021)

In other words, a heightened judicial scrutiny level is required to analyze cases involving minorities who are prevented from challenging a statute that discriminates against them on the basis of their status.

Despite being one of the criteria, the Court used in determining suspect classification. The phrase "discrete and insular minority" has no definitive meaning. Some scholars argued that it serves as an "umbrella term [and measurement] for the subsequent factors the Court looks at in determining suspectness" (Galvin, 2019), while others, like Professor Bruce Ackerman at Yale Law School suggests that "(a) group is discrete if they are visible in a way that makes them relatively easy for others to identify" and "insular if they tend to interact with each other with great frequency in a variety of social contexts." (Galvin, 2019) The Court will also examine whether or not such distinction affects their role and participation in society.

In October 2014, Bloomberg published an article featuring Apple Inc's C.E.O. Tim Cook, noticeably one of America's most powerful businessmen, where he revealed his sexual orientation in an open letter. According to Cook, he was motivated to publicly come out as gay after receiving letters from children struggling with sexual orientation. Cook once wrote that

"While I have never denied my sexuality, I haven't publicly acknowledged it either, until now. So let me be clear: I'm proud to be gay, and I consider being gay among the greatest gifts God has given me." As head of the world's first trillion-dollar company, Cook is the first openly gay C.E.O. of a Fortune 500 company and had helped millions of children realized that "it's ok to be gay." (Cook, 2014)

Many other influential figures have publicly addressed their sexual orientation. Lil Nas X, a twenty-one-year-old rapper, recently came out as gay two years ago on the last day of Pride Month. After tweeting, "some of y'all already know, some of y'all don't care, some of y'all not gone fwm no more. but before this month ends i want y'all to listen closely to c7osure" Lil Nas X released his song "C7losure" and confirmed his sexuality, where the lyrics sing "Ain't no more actin', man that forecast say I should just let me grow…this is what I gotta do, can't be regrettin' when I'm old." (Jacobs, 2019) Just last year, Riverdale's star Lili Reinhard also revealed that she is bisexual through her Instagram. She captioned, "Although I've never announced it public before, I am a proud bisexual woman. And I will be joining this protest [LGBTQ+ for Black Lives Matter] today."

The 2018 Democratic Politician and former Tallahassee, Andrew Gillum, admitted his sexual orientation in an interview. He states, "To be very honest with you, when you didn't ask the question, you put it out there is whether or not I identify as gay," he admitted. "And the answer is I don't identify as gay, but I do identify as bisexual, and that is something that I have never shared publicly before." Athletes, including U.S. ski champion Hig Roberts, the first male Alpine skier of his league to came out as gay during an interview with the New York Times; and Olympic swimmer, Markus Thormeyer shared his story, writing, "I want to share my story and be able to spread the message that it's OK to be gay." Thormeyer further revealed he had kept his

sexuality a secret because he feared rejection from teammates and people around him. The stories above only presented a small sample of the LGB community; several other influential LGBs individuals include Ryan Murphy, Anderson Cooper, Ellen DeGeneres, Michael Kors, Tom Ford, RuPaul, Cinthya Nixon, and the list goes on.

Until the 1970s, the American Psychiatric Association has listed homosexuality as a mental disorder, but later changed its diagnostic category because research proved that LGB people can adapt function and contribute to the society just like everyone else. As listed above, many LGB individuals and their community are not only capable of participating but they are also contributing to society through. Moreover, there are twelve LGB justices who are currently service on the highest Court of a state in the United States, these people are Monica Marquez (C.O.), Sabrina McKenna (H.I.), Beth Robinson (V.T.), Andrew J McDonald (C.T.), Mary Yu (W.A.), Lynn Nakamoto (OR), Margaret Chutich (M.N.), Lidia Stiglich (N.V.), Elsepth B. Cypher (M.A.), Paul Feinman (N.Y.), G. Helen Whitener (W.A.), and Martin Jenkins, who was appointed as California's Supreme Court justice on November 2020.

Additionally, the question of whether or not sexual orientation affects an individual's participation in society is already determined by the Court in the case, Obergefell. In the opinion, the Court proved that LGB individuals could participate in a meaningful community by implying that they are capable of parenting, creating a loving and supportive family. Quoting "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

The population of gay, lesbians, and bisexuals in the United States is challenging to estimate due to insufficient data and inaccurate statistics. However, various organizations and institutions have conducted research and survey studies, for example, the Pew Research Center and the UCLA Williams Institute School of Law. According to a study conducted in 2011 by Gary J. Gates, a former research director at UCLA, the data collected indicates 3.5% of adults in the United States identify as LGB, roughly ten million Americans. The 3.5% consists of 1.7% lesbian or gay and 1.8% bisexuals. The data also estimated that 19 million Americans (8.2%) report that they have engaged in same-sexual behavior, and nearly 25.6 million Americans (11%) acknowledge at least some same-sex sexual attraction. (UCLA, 2011) In another study conducted by GLAAD, an American non-governmental media organization that promotes understanding and advancing equality, on LGB youth statistics, its data presents up to 9.8% of youth ages 18-24 identified as gay, lesbian, or bisexual. (GLADD, 2017) These statistics above heavily indicate that LGB individuals are prominent and discrete, yet, remain as a minority within the United States population.

A COLLECTIVE EFFORT TO CHANGE - POLITICAL POWERLESSNESS

Political powerlessness is closely related to being a "discrete and insular minority." This component also has its origin from the Footnote Four of Carolene Products, which states "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more search judicial inquiry." This footnote is a basis for determining whether or not the political process has failed to protect the "discrete and insular minority", and this failure in the political process is related to the targeted group being politically powerless. When a targeted class is a minority with a history of discrimination, it is equivalent to political powerlessness because the legislative process has failed to warrant judicial intervention.

There are four possible approaching factors to political powerlessness, which are: (1) the group's ability to vote, (2) the numbers of the group, (3) the existence of favorable legislative enactments that might demonstrate political power, and (4) whether members of the group have achieved positions of power and authority. (Galvin, 2019)

The underrepresentation of LGB individuals in legislatures and positions of power and authority is indisputable. In the last few years, LGB elected officials in the United States have increased substantially, doubling since 2016. Despite this historic high rate, the LGB community is still severely underrepresented in elected office and holds limited government power. According to Victory Institute's Out for America 2020, a census of LGBTQ elected officials nationwide, there are 843 elected officials who are known openly LGBTQ in the U.S., making up as little as 0.17% of elected positions nationwide. It's important to note that even though the

census collected above includes both sexual orientation and gender identity. But even with the combined population, the LGBQT community still holds less than 1% of elected positions. (Victoria Institute, 2020) One of the highest-profile leader is Pete Buttigieg, who recently became the first openly gay candidate in American history to earn presidential primary delegates and confirmed a cabinet position. However, no LGB individual has served as President, Vice President of the United States for either major party or as a justice on the United States Supreme Court.

Ruben Gonzales, the executive director at LGBTQ Victory Institute, believes that "Over the past year, LGBTQ elected officials have been on the frontlines…passing legislation that moves equality forward for our community. Allies are more important, but LGBTQ representation in the halls of power is critical to the success of our movement."
Further evidence that shows the group's lack of political power is the abundance of passed laws discriminating against the LGB community in the United States. The LGBs are grossly underrepresented within the nation's legislative bodies. As a result, the interests and needs of LGBs are greatly compromised. Direct and proportional representation of LGBs in legislation can ensure the needs of their community, advocate those needs, and serve as allies in an effort to pass legislation relating to the LGB community.

One of President Biden’s top priorities after taking office is to pass the Equality Act. According to President Biden, quote “Every person should be treated with dignity and respect, and this bill represents a critical step toward ensuring that America lives up to our foundational values of equality and freedom for all.” The Equality Act receives high anticipation from many people belonging to the LGBT community, because it would ban discrimination against sexual orientation and gender idenity, while expanding protections in other areas like public

accommodation, credit and lending, and housing. As of February 24, 2021, the Equality Act has successfully passed in the House of Representatives with unanimous support from Democrats and eight Republicans. The Equality Act is facing opposition from many Republicans as they fear such a bill would infringe upon religious freedom under the Religious Freedom Restoration Act (RFRA), which protects the interest in religious freedom. The bill now goes to the Senate, where many are skeptical about its future. (Kurtzleben, 2021)

A CHARACTERISTIC THAT CANNOT BE CHANGED – IMMUTABILITY

Immutability is a trait that is "predetermined" and "not capable of or susceptible to change." (Merriam Webster, n.d.)

The Court in Frontiero recognized that no one should be penalized for bearing an immutable trait. It quotes, "the imposition of special disabilities upon the members of a particular [group] because of [the immutable characteristic] would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." While race and gender are considered immutable, other statuses, including ethnic, social-cultural, citizenship, poverty, or undocumented status, are not considered immutable characteristics as the Court in Plyler v. Doe found "it is the product of conscious...action." To be recognized as immutable under the Supreme Court's definition, the LGB community must demonstrate that sexual orientation is not a choice but determined at birth and beyond their control.

Before 1975, the American Psychiatric Association listed homosexuality as a mental disorder, but then later changed its official manual of psychiatric disorders to no longer consider homosexuality as a "psychiatric disorder" but instead as a "sexual orientation disturbance." Now, the A.P.A. has officially announced that "psychologists do not consider sexual orientation to be a conscious choice that can be voluntarily changed." Furthermore, the association suggested no link between sexual orientation and psychopathology and that "both heterosexual behavior and homosexual behavior are normal aspects of human sexuality." Accordingly, it abandoned the classification of homosexuality as a mental disorder. It's important to note that the American Psychiatric Association recognizes that "most people experience little to no sense of choice about their sexual orientation."

Despite numerous practices to change one's sexual orientation, for example, "reparative" or "conversion" therapy. Medical and health organizations reject these practices due to their range of dangerous practices and false claims to change a person's sexual orientation. Many medical practitioners and health organizations have disproven their efficacy and left such practices because it can lead to depression, anxiety, homelessness, drug use, and suicide in minors. (H.R.C.[QDH4]) The American Psychological Association has reported that sexual orientation change efforts (SOCEs) "is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex sexual attractions through SOCE." (H.R.C.) [QDH5] The Human Rights Campaign has declared a consensus on the "impropriety, inefficacy, and detriments of practices that seek to change a person's sexual orientation commonly referred to as "conversion therapy."

Not a single study has found a definitive cause for homosexuality, but many have concluded sexual orientation is deeply rooted and determined early in an individual's life. In the most extensive study to date conducted on sexual orientation, researchers confirmed that there's no single gene responsible for a person's sexual orientation, in-fact, same-sex behavior is genetically complicated, and social and environmental are also vital factors. (Akpan, 2019) According to a study published by the American Association for the Advancement of Science, sexuality cannot be predicted through human D.N.A. Rather, it is decided by factors like biology, psychology, or life experiences. Benjamin Neale, a geneticist at the Board Institute of M.I.T. and Harvard, hopes "that science can be used to educate people a little bit more about how natural and normal same-sex behavior is... It's written in our genes, and it's part of our environment. This is part of our species, and it's part of who we are." (Belluck, 2019) Nevertheless, up to 25% of

one's sexual orientation is linked to genetics, and it remains an immutable characteristic that is difficult to change or alter.

Furthermore, the Court in Obergefell has recognized sexual orientation's immutable characteristics by writing, "Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable." Given this statement by the Court, the term immutability is defined and addressed hereunder Obergefell. Any future cases raising the suspect classification for sexual orientation's immutability should be based upon the Court's opinion here.

What's most important here is the recognition that sexual orientation is not a conscious choice that can be easily changed. It is entirely beyond the control of the affected person, which fits the Court's definition of immutability. Despite the current consensus that there are various reasons for one's sexual orientation, scientists, psychiatrists, and doctors admit that there's still a need for more technology advancement to better understand sexual orientation. Even so, all experts agree that sexual orientation is immutable and beyond one's choice. (Balog, 2005)

CONCLUSION

Even though the discrimination history of sexual orientation is unparallel with the servility and extensive discrimination of race, it has been an issue for many years. The aforementioned court cases and history related to sexual orientation have documented the lengthy discrimination against LGBs. Throughout history, the LGB community has never been fully protected because they are a discrete and insular minority with a lack of political power. Data has indicated that only 3.5% of adults in the United States identify as LGB, which is roughly 10 million Americans. They are incredibly underrepresented because they only hold less than 1% of elected officials in the country. Many institutions, research organizations, and the United States Supreme Court have declared the immutability characteristic of sexual orientation through various clinical studies and its opinion in Obergefell. It's also explicit that LGB individuals are more than capable of contributing and advancing our society. Sexual orientation meets all of the requirements for suspect classification established and applied by the United States Supreme Court over the years. Accordingly, sexual orientation should be granted suspect classification and subject to the highest standard of review - strict scrutiny, under the Equal Protection Clause of the Fourteenth Amendment.

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