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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(This statement should be placed immediately preceding the statement of issues contained in the brief of the party. See copy of 6th Cir. R. 25 on reverse side of this form.)

EQUALITY FOUNDATION OF	:	
GREATER CINCINNATI, INC. et al.,	:	Civil Action
	:	
Plaintiffs-Appellees,	:	No. C-1-93-773
	:	
v.	:	
	:	
THE CITY OF CINCINNATI,	:	
Defendant-Appellant (94-3973)	:	Hon. S. Arthur Spiegel
	:	
EQUAL RIGHTS, NOT SPECIAL RIGHTS,	:	
Intervenor-Appellant (94-3855).	:	

DISCLOSURE OF CORPORATE AFFILIATIONS
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STATEMENT OF THE STANDARD OF REVIEW

*For all of the above, amicus curiae adopts the statements as set out in Appellees' brief.

v

STATEMENT OF INTEREST
OF THE AMICUS CURIAE

James E. Andrews, as Stated Clerk of the General Assembly of the
Presbyterian Church (U.S.A.)

James E. Andrews, as Stated Clerk of the General Assembly, is the senior

continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Since 1978, General Assemblies of the Presbyterian Church (U.S.A.) have stood firmly in support of equal rights for homosexual persons under the law. These statements include a call for civil rights in housing, employment, and public accommodations, as well as vigilance against laws that discriminate against persons on the basis of sexual orientation.

ARGUMENT

I. THE PRESBYTERIAN CHURCH (U.S.A.) GENERAL ASSEMBLY
SUPPORTS BASIC CIVIL LIBERTIES FOR
HOMOSEXUAL PERSONS

On November 2, 1993, a majority of voters in the City of Cincinnati approved a measure known as Issue 3, which was an amendment to the city's charter. The text read as follows:

ARTICLE XII

NO SPECIAL CLASS STATUS MAY BE GRANTED
BASED UPON SEXUAL ORIENTATION, CONDUCT
OR RELATIONSHIPS.

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

The effect of this amendment is to deprive homosexual persons of equal access to government and the benefits and protections government may confer. In light of Issue 3's heavy burden upon homosexual persons' civil liberties, it is vital that this Court know of this Amicus' support of equal rights laws. The Presbyterian Church (U.S.A.) and its predecessor denominations¹ have firmly and consistently recognized and supported Biblical principles of justice and equity for all persons, including homosexual persons, as revealed in Jesus who welcomed and loved all.

¹The Presbyterian Church (U.S.A.) was formed in 1983 upon the reunion of the two largest Presbyterian denominations in the United States: the Presbyterian Church in the United States and the United Presbyterian Church, U.S.A. The General Assembly is the highest governing body in the Presbyterian denomination. Predecessor General Assemblies have met in what is now the United States since 1789. Citations to General Assembly statements in this brief use the former denominational names. Upon reunion in 1983, it was determined the General Assembly statements of the merging denominations would survive as statements of the Presbyterian Church (U.S.A.).

The Presbyterian Church (U.S.A.) disapproves of homosexual behavior, particularly with respect to ordained officers of the Church, and has declared that "homosexuality is not God's wish for humanity."² The General Assembly has declared that "the practice of homosexuality is sin."³ Nevertheless, these same pronouncements call for such activity to be treated as matters of private conduct protected from governmental intrusion. The Presbyterian Church has consistently sought to reserve such matters for moral and theological dialogues.

Beginning in 1978, predecessor bodies of the Presbyterian Church (U.S.A.) have called upon their members and civil government to ensure the civil liberties and equal rights of homosexual persons:

There is no legal, social, or moral justification for denying homosexual persons access to the basic requirements of human social existence.

Vigilance must be exercised to oppose federal, state, and local legislation that discriminates against persons on the basis of sexual orientation and to initiate and support federal, state, or local legislation that prohibits discrimination against persons on the basis of sexual orientation in employment, housing, and public accommodations.⁴

The 117th and 118th General Assemblies asserted "the need for the church to stand for just treatment of homosexual persons in our society in regard to their civil liberties, equal rights and protection under the law from social and economic discrimination which is due all its citizens."⁵

The 199th General Assembly of the Presbyterian Church (U.S.A.) called for the elimination of laws governing the private sexual behavior between consenting adults [and the passage] of laws forbidding discrimination based on sexual orientation in employment, housing and public accommodations.⁶

²Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A. (1978) Part I, at 264.

³Id.

⁴Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A. (1978) Part I, at 265 (emphasis added).

⁵Minutes of the 119th General Assembly, Presbyterian Church in the United States (1979) Part I, at 208 (emphasis added).

⁶Minutes of the 199th General Assembly, Presbyterian Church (U.S.A.) (1987) Part I, at 776.

The 205th General Assembly of the Presbyterian Church (U.S.A.) called upon Presbyterians to

stand for just treatment of homosexual persons, including working toward protection under the law from discrimination...."⁷

The Presbyterian Church (U.S.A.) calls upon this Court to consider the moral, ethical, and religious ramifications of this discriminatory amendment to Cincinnati's charter. The Church's theology and the General Assembly policy statements cited above move it to oppose legislation such as Issue 3.

⁷Minutes of the 205th General Assembly, Presbyterian Church (U.S.A.) (1993) Part I, at 118-119. The 205th General Assembly further condemned all discriminatory legislation such as was enacted with Issue 3.

**II. ISSUE 3 VIOLATES
THE UNITED STATES CONSTITUTION**

In both its preliminary injunction ruling, Equality Foundation v. City of Cincinnati, 838 F. Supp. 1235 (S.D. Ohio 1993) ("Equality I"), and its permanent injunction ruling, Equality Foundation v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994) ("Equality II"), the federal district court noted constitutional violations spawned by Issue 3. Among others, the court discerned violations of the fundamental right of equal access to the political process, violations of the fundamental rights of free speech and association, and violations of the fundamental right to petition government for redress of grievances. In addition, the district court determined that homosexual citizens constitute a quasi-suspect class. Statutes that violate equal access for such quasi-suspect classes are entitled to intermediate scrutiny.

Right of Equal Access to the Political Process

As noted by the district court, Issue 3 did not merely repeal the City of Cincinnati's 1992 Human Rights Ordinance which included sexual orientation. Issue 3 set up an almost insurmountable barrier between homosexual Cincinnatians and their government:

In short, under Issue 3's sweeping, all-encompassing language, the City Council and any and all aspects of city administration would no longer have the power to do anything that could be construed as "protecting" gays, lesbians and bisexuals, or giving them "preferential treatment."

Thus, under its very language, Issue 3 completely excludes an entire group of citizens from all areas of city politics with respect to issues of vast importance to that group. Issue 3 completely [cuts off gays], lesbians and bisexuals from the normal and accessible avenues of political action and political participation

. . . .
. . . .

[W]e conclude that, by its very terms, Issue 3 singles out persons of "homosexual, lesbian or bisexual orientation" for unique treatment not imposed upon any other segment of the community. Furthermore, Issue 3 does not target specific issue[s] or types of problems that affect all citizens, nor does it include all citizens within its restrictions. Rather, Issue 3 targets specific citizens

based upon who they are. It removes them from the normal political process and requires them to pursue a more complex, costly and burdensome avenue in pursuit of any rule, regulation, ordinance or policy, on their behalf. Equality II at 429.

Government cannot target a particular group of citizens. "[A]ny legislation that disadvantages an independently identifiable group of people by making it more difficult for that group to enact legislation in its behalf, 'fences' that group out of the political process, and thereby violates their fundamental rights." Id. at 430 (citing Equality I, 838 F. Supp. at 1238-42; Evans v. Roemer, 854 P.2d 1270, 1282 (Colo.), cert. denied, 114 S.Ct. 419 (1993)). This is not a new constitutional principle arising from judicial consideration of anti-homosexual initiatives. The principle of equal access to government is fundamental to the American political process and recognized by the United States Constitution and the United States Supreme Court.

In Hunter v. Erickson, 393 U.S. 385 (1969), the Court struck down a city charter amendment passed by a majority of the voters in Akron, Ohio. That amendment prohibited the city council from implementing any ordinance dealing with racial, ancestral, or religious discrimination in housing without the approval of a majority of Akron voters. The Hunter Court ruled that "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." Id. at 393 (citations omitted) quoted in Equality II, 860 F. Supp. at 431. Likewise, in Washington v. Seattle School District, 458 U.S. 457 (1982), the Court overturned a statewide initiative which prohibited the use of busing to achieve integration. The Fourteenth Amendment "reaches a political structure" that "distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." Id. at 467 quoted in Equality II, 860 F. Supp. at 432.

As in Akron, Ohio and the State of Washington, the majority of the electorate in Cincinnati identified "a small, unpopular group of citizens," Equality II at 433, for an especial burden--a burden of separation from government and any benefits it could provide. "To single out a group of citizens and place upon them the added and virtually insurmountable burden in their pursuit of protection from majority discrimination thoroughly undermines the spirit of our

constitution. In our great society we adhere to the 'self evident' truth that all people are created equal." Id.

Rights of Free Speech, Association, and the Petition of Government

While the right of free speech takes many forms, there can be no doubt that the speech directed at government to effect social change is of paramount importance. "The First Amendment was 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Meyer v. Grant, 486 U.S. 414, 421 (1988) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) quoted in Equality II at 444.

Under Issue 3, the ability of homosexual people to participate in political discourse is fettered in the most onerous fashion. Neither the city nor any of its boards and commissions may enact ordinances, regulations, rules, or policies that could protect homosexual people in any way. Issue 3 requires by law that the political speech of homosexual persons fall on deaf ears. Issue 3 not only reduces the "'quantum of speech on public issue[s]," Equality II at 446, (quoting Meyer, 486 U.S. at 423), it makes that speech ineffective and barren.

Issue 3 also impinges upon the freedom of association. Indeed, "Issue 3 eviscerates the very purpose of gays, lesbians and bisexuals, or their organizations, lobbying or petitioning City Council or city administration, or attempting to gain access to those bodies." Equality II at 445 (citing Equality I, 838 F. Supp. at 1238). There is no purpose in homosexual people organizing themselves to lobby the city; Issue 3 ensures that their efforts will be futile. Even beyond the futility, Issue 3 sets the stage for members of homosexual groups to suffer discrimination in jobs, housing, and public accommodations. For those in the membership that advocate publicly for equal rights, Issue 3 ensures that such rights will never exist and, moreover, that the speaker will remain ever-vulnerable to the very discrimination she seeks to remedy. See Equality II, 860 F. Supp. at 445.

Finally, Issue 3 strikes at the heart of the right to petition government for the redress of grievances. In 1991 and 1992, before Issue 3, homosexual Cincinnatians and their supporters lobbied the City Council to include the category of sexual orientation in two anti-discrimination ordinances, the Equal Employment Opportunity Ordinance and the Human Rights Ordinance. Id. at 421. As with other groups seeking other goals, the homosexual community lobbied

individual council members and ultimately secured a majority vote of the council. This process, of course, is fundamental to the American legislative process. It plays out across our nation each day--on the local, state, and federal levels.

Issue 3, however, changes the means by which homosexual citizens petition their government for redress of grievances. For this particular group, the doors to City Hall are closed. Instead, to secure any ordinance, rule, or policy whatsoever, they must secure an amendment repealing or changing Issue 3. Moreover, they must secure such an amendment from the very voters who adopted Issue 3 by a vote of 62% to 38%. To obtain even the most basic benefit from their government, they must put their request to the "very majority that deprived them access [of] the legislature in the first place" ⁸ Equality II at 433. Such a procedure violates the fundamental right to petition government and "undermines the integrity of our nation." Id.

Quasi-Suspect Class

The district court determined that homosexual citizens constitute a quasi-suspect class and, thus, laws aimed at them are subject to intermediate scrutiny. The Equality II court identified several core tests in determining a quasi-suspect classification:

⁸The district court concluded "that under the Issue 3 Amendment, all citizens, with the exception of gay, lesbian, and bisexuals, have the right to appeal directly to the city council for legislation, while only members of the Plaintiffs' independently identifiable group must proceed via the exceptionally arduous and costly route of amending the City Charter before they may obtain any legislation bearing on their sexual orientation." Equality II at 433.

*Whether the group has suffered a history of discrimination, id. at 684-85; City of Cleburne v. Living Center, Inc., 473 U.S. 432, 441 (1985).

*Whether the group's defining characteristic is in any way related to its members' ability to contribute to or participate in society, id. at 441; Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Mathews v. Lucas, 427 U.S. 495, 505 (1976).

*Whether the group is politically powerless, see Frontiero, 411 U.S. at 686.

After a four-day trial, the court determined these tests were met. Homosexual people have suffered a history of pervasive and invidious discrimination based upon their sexual orientation. Equality II 426, 436-37. This irrational discrimination has been imposed by government, by private employers, and by society in general. Id. at 426, 436-37. Same-gender orientation is in no way related to one's ability to participate in or contribute to society. Id. at 426, 437. Finally, while homosexual persons are "not a wholly politically powerless group, [they] do suffer significant political impediments." Id. at 437. Because of discrimination and disapproval by the majority, homosexual persons have difficulty in organizing to lobby government and are often unable to build coalitions with other minority groups. Id. at 437-38. Moreover, of the approximate 38 anti-homosexual initiatives across the country, 34 were adopted by voters--further evidencing the political powerlessness of homosexual persons. Id. at 439. Under the intermediate scrutiny standard of a quasi-suspect class, Issue 3 fails to pass constitutional muster. Equality II at 441.

As the 1978 General Assembly prophetically stated, "Vigilance must be exercised to oppose federal, state, and local legislation that discriminates against persons on the basis of sexual orientation There is no legal, social, or moral justification for denying homosexual persons access to the basic requirements of human social existence" ⁹ Today, over 15 years later, the General Assembly continues to call for basic civil rights for homosexual persons.

⁹Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A. (1978) Part I, at 265.

**III. THE MAJORITY MAY NOT DENY A PARTICULAR
MINORITY AN EFFECTIVE VOICE**

The district court found that "Issue 3 completely excludes an entire group of citizens from all areas of city politics with respect to issues of vast importance to that group." Equality II at 429. Thus the effect of Issue 3 is to allow the majority (those who voted in favor of Issue 3) to deprive an identifiable minority (homosexual people) of any meaningful input on issues dramatically affecting many aspects of their lives. As noted above, this is not constitutionally permissible.

Since the inception of Presbyterianism in the United States, the Church's polity has consistently provided for government by elected representatives who recognize that the will of the majority shall prevail, but the rights of the minority shall be protected.¹⁰ In its constitutional expression of Historic Principles the denomination affirmed "the orderly way by which the church handles conflict so that the rights of the minority are protected from the tyranny of the majority and, at the same time, the rights of the majority are protected from [being paralyzed by] the intransigence of a minority."¹¹

In the Church's system of polity, as in the secular courts, the rights of the minority are carefully protected within the Constitution and by the procedures of the Presbyterian Church (U.S.A.). The minority has "every reasonable right to press their case to try to persuade the majority of the church to their point of view"¹² Presbyterians have long recognized the value of preventing the majority from denying the minority "'an effective voice in the governmental affairs which substantially affect their lives'." Equality II at 433

¹⁰Book of Order, Presbyterian Church (U.S.A.) (1993-1994) G-1.0400. The Book of Order sets out the form of government, directory for worship, and rules of discipline for the Presbyterian Church (U.S.A.).

¹¹Minutes of the 195th General Assembly, Presbyterian Church (U.S.A.) (1983) Part I, at 152-53.

¹²Id. at 156.

(citing Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Equality I, 838 F. Supp. at 1241).

Allowing the implementation of Issue 3 will permit the majority of citizens to deny a specific minority (homosexual persons) an effective voice in governmental, business, and personal affairs that substantially affect their lives. Such a denial stifles the fundamental values of justice and fairness so long and highly valued by the citizens of these United States. We call upon this Court to prevent this amendment from effectively depriving a particularly vulnerable class of persons of the rights due all citizens.

CONCLUSION

The district court's judgment carefully preserves for all the citizens of Cincinnati the equal protection of the law. For the foregoing reasons, the order of district court should be affirmed.

Respectfully Submitted,

By: _____

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CERTIFICATE OF BAR MEMBERSHIP

I, Eric J. Graninger, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Sixth Circuit.

Eric J. Graninger

CERTIFICATE OF SERVICE

I, Eric J. Graninger, as a member of the bar of the United States Court of Appeals for the Sixth Circuit, hereby certify that on December 5, 1994, I caused two copies of this brief amicus curiae to be served by placing same in the United States mail, first class, postage paid, to the following:

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