12-2335,12-2435

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

EDITH SCHLAIN WINDSOR, In Her Official Capacity as Executor of the Estate of Thea Clara Spyer,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* BAR ASSOCIATIONS AND PUBLIC INTEREST AND LEGAL SERVICE ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE OF THE JUDGMENT BELOW

Shannon P. Minter
Christopher F. Stoll
NATIONAL CENTER
FOR LESBIAN RIGHTS
870 Market Street, #370
San Francisco, CA 94102
(415) 392-6257

Susan L. Sommer
LAMBDA LEGAL DEFENSE
& EDUCATION FUND, INC.
120 Wall Street
19th Floor
New York, NY 10005
(212) 809-8585

Timothy S. Fisher
Brian P. Rice
MCCARTER & ENGLISH, LLP
CityPlace I
185 Asylum Street
Hartford, CT 06103
(860) 275-6775

This brief is filed on behalf of the following organizations:

Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national non-profit, nonpartisan organization in Washington, D.C. whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including discrimination. AAJC is committed to challenging barriers to equality for all sectors of our society and has supported same-sex marriage rights as an amicus in other cases on this issue.

Asian Law Caucus has a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islander communities. The Asian Law Caucus is a member of the Asian American Center for Advancing Justice. Recognizing that social, economic, political, and racial inequalities continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society, with a specific focus directed toward addressing the needs of low-income, immigrant, and underserved Asian and Pacific Islanders. As the oldest Asian American legal rights organization devoted to protecting the civil rights of all racial and ethnic minorities, it has a

strong interest in protecting the integrity of the core constitutional principle of equal protection under the law for all Americans.

Asian Pacific American Legal Center ("APALC"), a member of Asian American Center for Advancing Justice, is the nation's largest public interest law firm devoted to the Asian American, Native Hawaiian, and Pacific Islander communities. As part of its mission to advance civil rights, APALC has championed the equal rights of the lesbian, gay, bisexual, and transgender ("LGBT") community, including supporting the freedom to marry and opposing Proposition 8.

Connecticut Bar Association, Inc. ("CBA"), founded in 1875, is the preeminent organization for lawyers and the legal profession in Connecticut. The purposes of the CBA include promoting the public interest through the advancement of justice and the protection of liberty, supporting or opposing legislation and regulations consistent with the interests of the public good and the CBA's Members, promoting diversity within the Bar and the Bench, and safeguarding the dignity of the legal profession.

Connecticut Hispanic Bar Association ("CHBA"), founded in 1993, works to enhance the visibility of Hispanic lawyers and assists the public and private sectors in achieving diversity in their law firms and legal departments. Throughout its history, CHBA has been active in community service. It offers a mentoring

program to Hispanic law, college, and high school students, in addition to a scholarship program for law students. CHBA advocates for diversity and equal treatment in the judicial system. In the past, CHBA attorneys have examined the treatment of racial and ethnic minorities in the court system and have advocated for the provision of interpreter services in Connecticut. CHBA is a member of the Lawyers Collaborative for Diversity.

Connecticut Women's Education and Legal Fund ("CWEALF") is a non-profit women's rights organization dedicated to empowering women, girls, and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces, and their private lives. Since its founding in 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights and end sex discrimination.

Empire Justice Center ("Justice Center") is a statewide, not-for-profit public interest law firm with offices in Rochester, Albany, White Plains, and Central Islip. Established in 1973, its mission is to protect and strengthen the legal rights of people in New York State who are poor, disabled, or disenfranchised through systems change advocacy and direct representation, as well as training and support to other advocates and organizations in a range of substantive law areas. Since its founding, the Justice Center has worked to oppose discrimination and

challenge barriers to equality, including barriers based upon sexual orientation or gender identity.

Empire State Pride Agenda is New York's LGBT civil rights and advocacy group. Its mission is to win equality and justice for LGBT New Yorkers and their families. It recognizes that while significant cultural, legal, and governmental advances have led to greater equality for LGBT New Yorkers, they and their families remain highly vulnerable without the vast majority of rights and protections that most New Yorkers take for granted.

Equal Justice Society ("EJS") is a national legal organization that promotes equality and an end to all manifestations of invidious discrimination and second-class citizenship. Using a three-pronged strategy of law and public policy advocacy, building effective progressive alliances, and strategic public communications, EJS's principal objective is to combat discrimination and inequality in America.

Equality Federation ("Federation") is the national alliance of state-based LGBT advocacy organizations. The Federation works to achieve equality for LGBT people in every U.S. state and territory by building strong and sustainable statewide organizations.

Freedom to Marry is the campaign to end marriage discrimination nationwide. Freedom to Marry works with partner organizations and individuals to

win the right to marry in more states, solidify and diversify the majority for marriage, and challenge and end federal marriage discrimination. Freedom to Marry is based in New York, and has participated as *amicus curiae* in several marriage cases in the United States and abroad.

George W. Crawford Black Bar Association ("Crawford") is a volunteer state-wide organization of attorneys, judges, and law students in the State of Connecticut. Crawford's purpose is to work aggressively for the enhancement of the role and number of Black people in the legal profession; focus attention on legal issues which affect members of the Black community; provide a vehicle for interaction between members of Crawford and Black businesses and professional, and other organizations; and communicate and affiliate with local and national organizations within the legal profession. Crawford is a state-wide affiliate of the National Bar Association, the oldest and largest national organization of attorneys of color.

Hispanic National Bar Association ("HNBA") is an incorporated, not-for-profit, national membership organization that represents the interests of the more than 100,000 attorneys, judges, law professors, legal professionals, and law students of Hispanic descent in the United States, its territories, and Puerto Rico. HNBA supports equal application of the law to all.

Human Rights Campaign ("HRC"), the largest national LGBT political organization, envisions an America where LGBT people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits, and responsibilities.

Japanese American Citizens League ("JACL") was founded in 1929 and is the oldest and largest Asian American civil rights organization in the United States. It led the fight for redress for Japanese Americans incarcerated during World War II and has also fought for the civil liberties of all people including the right to vote, own real property, get a job, and marry a person of one's choice.

Jewish Alliance for Law and Social Action ("JALSA") works to eliminate discrimination based on race, religion, ethnicity, gender, age, sexual orientation, and gender identity. As *amici* in *Bowers v. Hardwick*, *Lawrence v. Texas* and *Goodridge v. Dep't of Public Health*, and as participants in major legislative campaigns, both as JALSA and its earlier presence as American Jewish Congress, New England, JALSA members have been early advocates for equal rights and full protection of the law for LGBT people. JALSA provided key leadership in the campaign for Massachusetts recognition of same-sex couples' equal marriage rights.

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of LGBT people and those with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as counsel or *amicus* in numerous challenges to LGBT discrimination and has long sought heightened scrutiny for sexual orientation-based classifications.

Legal Aid Society ("Society") is a private, not-for-profit legal services organization, the oldest and largest in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. It is dedicated to one simple but powerful belief: that no New Yorker should be denied access to justice because of poverty. With a commitment to equal justice for all and eliminating discrimination on the basis of numerous classifications including sexual orientation and gender identity, the Society handles 300,000 individual cases and matters annually and provides a comprehensive range of legal services in three areas: the Civil, Criminal, and Juvenile Rights Practices. In recognition that its LGBT clients are living at disproportionately higher poverty rates and are more likely to be dependent on public benefit programs, the Society is an outspoken advocate committed to removing barriers to equality for these persons.

Legal Aid Society-Employment Law Center ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities.

Since 1970, LAS-ELC has represented plaintiffs in employment cases, particularly those of special import to communities of color, women, recent immigrants, individuals with disabilities, and LGBT individuals.

Legal Services NYC ("LS-NYC") is the nation's largest civil legal aid program, assisting over 40,000 New Yorkers every year. The LS-NYC network includes offices in all five New York City counties and provides services in over 20 practice areas, including disability advocacy, access to government benefits, healthcare rights, housing protection, and matrimonial and custody rights. LS-NYC has long challenged discriminatory practices affecting low income New Yorkers, and has sought to assure equal access to essential federal, state, and local programs such as SSI/SSD, public assistance, and shelter subsidies. LS-NYC also operates numerous programs specifically focused on LGBT communities, including the Health Benefits Unit at Manhattan Legal Services, the HIV/LGBT Advocacy Project at Queens Legal Services, and Comprehensive Rights Unit at South Brooklyn Legal Services.

Lesbian, Gay, Bisexual & Transgender Community Center in New York City ("LGBT Community Center") is the largest LGBT multi-service organization on the East Coast and the second largest LGBT community center in the country, offering many programs for the LGBT community, including Center Families. More than 2,500 families in the tri-state area participate in the Center Families

program, which promotes the legitimacy and visibility of LGBT families. Consistent with its mission of supporting these families, the LGBT Community Center joins in this brief due to its strong belief that same-sex couples must have equal access to marriage and the same protections, rights, benefits, and responsibilities afforded to heterosexual married couples in this country.

LGBT Bar Association of Greater New York ("LeGaL") was one of the nation's first bar associations of the LGBT legal community and remains one of the largest and most active organizations of its kind in the country. Serving the New York metropolitan area, LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community, and promoting the expertise and advancement of LGBT legal professionals.

Marriage Equality USA ("MEUSA") is a national, not-for-profit, volunteer-based organization which leads nonpartisan, community-based educational efforts to secure legally recognized civil marriage equality at the federal and state levels without regard to gender identity or sexual orientation. Many of the organization's members are same-sex couples who are legally married in their home states but have no rights, responsibilities, or recognition as married couples under federal law because of the Defense of Marriage Act.

National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the area of civil rights and advocated for the interests of Asian Pacific American attorneys and their communities.

National Center for Lesbian Rights ("NCLR") is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has an interest in ensuring that laws that treat people differently based on their sexual orientation are subject to heightened scrutiny, as equal protection requires.

National Organization for Women Foundation ("NOW") is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. For decades, NOW has advocated for equal rights and full protection of the law for LGBT persons and has led the effort for recognition of same-sex couples' equal marriage rights.

New York County Lawyers' Association ("NYCLA") is a non-profit bar association of 9,000 members. Since its founding in 1908, NYCLA has advocated

for legal system reform and access to justice for all. NYCLA has long supported full, equal marriage rights for same-sex couples and has participated as *amicus curiae* in cases challenging barriers to equality based on sexual orientation.

Out & Equal Workplace Advocates is the leading champion for fully inclusive workplaces that convenes, influences, and inspires global employers and their LGBT and allied employees. Its vision is that all LGBT people should be free to be open, authentic, and productive at work.

Permanent Commission on the Status of Women ("PCSW") was established by the Connecticut State Legislature in 1973. PCSW works to eliminate sex discrimination in Connecticut by informing leaders about the nature and scope of discrimination, serving as a liaison between government and private interest groups concerned with services for women, promoting consideration of women for governmental positions, and working with state agencies to access programs that affect women.

South Asian Bar Association of Connecticut ("SABAC") was formed in 2003 to serve as a resource to South Asian lawyers and law students for mentoring, networking, and community outreach. SABAC is a member organization of the North American South Asian Bar Association ("NASABA") and has played an active role in NASABA.

Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization dedicated to fighting hate and bigotry and to seeing justice for the most vulnerable members of society. SPLC's advocacy and impact litigation on behalf of the LGBT community spans decades—from an early case challenging the military's anti-gay policy, *Hoffburg v. Alexander*, to the monitoring of anti-gay hate and extremist groups today.

Transgender Law Center is the leading national legal organization dedicated to advancing the rights of transgender and gender-nonconforming people. Transgender Law Center works to change law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression.

Vermont Freedom to Marry Task Force, formed in 1996, is engaged in educating to end discrimination in marriage nationwide and serving as a resource to same-sex couples nationwide about marriage in Vermont concerning financial and tax issues, family and child custody concerns, and other states' and the federal government's discriminatory treatment of married same-sex couples.

Women's Bar Association of the State of New York ("WBASNY") is a statewide not-for-profit organization of attorneys, with eighteen chapters and more than 3,600 members. WBASNY is dedicated to fair and equal administration of justice and has been a vanguard for the rights of women, same-sex couples, and

LGBT persons. It has participated as an *amicus* in numerous cases supporting equal rights under the law for all persons, regardless of sexual orientation.

FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

None of the *amici* has a parent corporation, and no corporation owns 10% or more of any *amici*'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are a coalition of bar associations and public interest and legal service organizations committed to protecting the equal rights of women and minorities in the United States, including African-Americans, Latinos, Asian Americans and Pacific Islanders, women, and lesbian, gay, bisexual, and transgender individuals. *Amici* submit this brief in support of Plaintiff-Appellee ("Plaintiff") to ensure that the Constitution's guarantees of equal protection effectively protect all people from invidious discrimination, whether on account of race, gender, national origin, religion, alienage, or sexual orientation.

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[1] The parties have consented to the filing of this brief. Substantially similar briefs were submitted by many of the same *amici curiae* and some of the same counsel in three other cases challenging the constitutionality of the federal Defense of Marriage Act, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *petitions for cert. filed*, Nos. 12-13 (U.S. June 29, 2012), 12-15 (U.S. July 3, 2012), 12-97 (U.S. July 24, 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, *appeal docketed*, Nos. 12-15388, 12-15409 (9th Cir. Feb. 24, 2012), *petition for cert. before judgment filed*, No. 12-16 (U.S. July 3, 2012); and *Cardona v. Shinseki*, *appeal docketed*, Vet. App. No. 11-3083 (Vet. App. Oct. 13, 2011). The briefs in *Massachusetts* and *Cardona* were primarily authored by the American Civil Liberties Union Foundation, also counsel to Plaintiff-Appellee herein. The ACLU Foundation of Northern California was counsel on the subsequently filed brief in *Golinski*. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting this brief. No person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29.

SUMMARY OF THE ARGUMENT

The level of judicial scrutiny to apply when gay people are singled out for government discrimination remains a matter of first impression in this Circuit. While the court below declined to decide the question, a different district court within the Circuit recently gave careful consideration to the issue in another case finding the Defense of Marriage Act ("DOMA") unconstitutional, and concluded that heightened scrutiny is required when the government draws classifications based on sexual orientation. *Compare Windsor v. United States of America*, 833 F. Supp. 2d 394, 401-02 (S.D.N.Y. 2012) (with little analysis, declining to decide whether heightened scrutiny is appropriate), *with Pedersen v. U.S. Office of Pers. Mgmt.*, No. 3:10-cv-1750 (VLB), 2012 U.S. Dist. LEXIS 106713, at *51-52 (D. Conn. July 31, 2012), *appeal docketed*, No. 12-3273 (2d Cir. Aug. 17, 2012), *petition for cert. before judgment filed*, No. 12-231 (U.S. Aug. 21, 2012) (noting that, "[c]onsidering the import of the elemental premise of equal protection and in light of the lack of persuasive authority as to appropriate . . . level of scrutiny, it is this Court's duty to meaningfully assess in the first instance whether sexual orientation constitutes a suspect or quasi-suspect class," and concluding that statutory classifications based on sexual orientation are entitled to heightened scrutiny).

Amici urge the Court to decide this case by holding that government classifications based on sexual orientation must be subjected to heightened scrutiny. In a long line of decisions, the Supreme Court has established a framework for determining when courts should be suspicious of government action treating two similarly situated groups of people differently. The Executive Branch, like the district court in *Pedersen*, has examined these precedents and concluded that under any reasonable application of the Supreme Court's test, legislative classifications based on sexual orientation should be denied a presumption of constitutionality and instead be subjected to heightened scrutiny. *See* Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011)[2]; *see also Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *110.

The protection of heightened scrutiny for sexual orientation classifications is long overdue. For 25 years, the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), effectively distorted federal equal protection case law and

[2] *Available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The Executive Branch has taken this position in this case and in other cases across the country challenging the constitutionality of DOMA. *See, e.g.*, Brief for the United States ("U.S. Brief") at 11; *see also, e.g.*, briefs filed by the Executive Branch in *Massachusetts*, 682 F.3d 1, and *Golinski v. Office of Pers. Mgmt.*, Nos. 12-15388, 12-15409 (9th Cir. Feb. 24, 2012).

prevented gay people[3] from receiving the judicial protection against unjustified unequal treatment that heightened scrutiny provides. During this time period, courts read *Bowers* as categorically foreclosing gay people from being treated as a suspect or quasi-suspect class, even if they would have received such protections under the traditional equal protection analysis. *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990).

Now that *Bowers* has been overruled by *Lawrence v. Texas*, 539 U.S. 558, 575-78 (2003), any impediment to a determination that heightened scrutiny is appropriate for sexual orientation classifications following traditional equal protection analysis has been removed. Notably, to date this Circuit has not directly ruled on the question, leaving this Court a clean slate, without the stain of *Bowers*, on which to analyze the traditional equal protection considerations for heightened scrutiny. Although *amici* agree with the court below, *Windsor*, 833 F. Supp. 2d at 402, and with Plaintiff that DOMA fails even rational-basis review, invalidating DOMA only under that standard would leave the proper level of scrutiny unresolved and gay people in this Circuit vulnerable to continued discrimination that purportedly clears the threshold of rationality. Indeed, there is presently a disparity among district court decisions within this Circuit on whether even to

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[3] As used in this brief, *amici*'s references to gay people include lesbians, gay men, and bisexual people, who are discriminated against based on sexual orientation.

reach the question of the level of scrutiny required, calling for resolution by this Court. The Court should apply the same equal protection analysis used by the Executive Branch and finally provide gay people the critical safeguards to which they are entitled under a proper equal protection standard.

ARGUMENT

I. When A Classification Is Rarely Relevant To Government Decision Making And Often Has Been Used For Illegitimate Purposes, Courts Treat The Classification As "Suspect" Or "Quasi-Suspect."

Most legislative classifications come to the court with a presumption of constitutionality. Even though it is possible for many classifications to be employed in an unconstitutional manner, courts generally "will not presume that any given legislative action . . . is rooted in considerations that the Constitution will not tolerate." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). In order to overcome that presumption, a plaintiff must show either that the classification's "relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," or that the classification is not justified by a "legitimate state interest." *Id.* at 446-47.

Certain classifications, however, carry a particularly high risk of being employed illegitimately and are therefore treated as "suspect" or "quasi-suspect." *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). In a long line of cases, the Supreme Court developed a framework for determining whether a

classification should be treated with suspicion and subjected to heightened scrutiny. The essential factors in this framework are (1) whether a classified group has suffered a history of invidious discrimination, and (2) whether the classification has any bearing on a person's ability to perform in or contribute to society. As additional—but not dispositive—factors, courts occasionally have considered whether the characteristic is immutable or an integral part of a person's identity and whether the group is a minority or lacks sufficient power to protect itself in the political process. *See Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *70-71, 91-92; *Golinski*, 824 F. Supp. 2d at 983.

The purpose of examining these various factors is to assess "the likelihood that governmental action premised on a particular classification is valid as a general matter," and therefore entitled to a presumption of constitutionality. *Cleburne*, 473 U.S. at 446. No single factor is dispositive, and each can serve as a warning sign that a particular classification "provides no sensible ground for differential treatment," *id.* at 440, or is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

In our system of separation of powers, the judiciary plays a critical role in carefully reviewing such high-risk classifications under the Equal Protection Clause to ensure that "the democratic majority . . . accept[s] for themselves and

their loved ones what they impose on you and me." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). When the democratic majority refuses to do so, "[i]t is emphatically the province and duty of the judicial department to say what the law is" and declare the legislation unconstitutional. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). "The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury*] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring); *see also* Federalist 78, at 405 (Hamilton) (G. Carey & J. McClellan eds. 2001). When a classification poses a special risk of such misuse, the courts must examine the classification with "more searching judicial inquiry" to ensure that the classification is not being used improperly to oppress a vulnerable group. *Carolene Prods.*, 304 U.S. at 153 n.4.

The Supreme Court has "so far . . . given the protection of heightened equal protection scrutiny" to classifications based on race, sex, illegitimacy, religion, alienage, and national origin. *Romer v. Evans*, 517 U.S. 620, 629 (1996); *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

> Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and

> illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.

Cleburne, 473 U.S. at 453 n.6 (Stevens, J., concurring) (internal quotation marks and citation omitted). These high-risk classifications are not always forbidden, but they must be approached with skepticism and subjected to heightened scrutiny in order to "smoke out" whether they are being used improperly. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Depending on the classification at issue, the Supreme Court has described its review as "strict scrutiny" or "intermediate scrutiny," but under both forms of heightened scrutiny, the court approaches a classification skeptically and requires the government to bear the burden of proving the statute's constitutionality. *See United States v. Virginia*, 518 U.S. 515, 531-33 (1996).

For the reasons explained below, sexual orientation should be added to the list of classifications "given the protection of heightened equal protection scrutiny." *Romer*, 517 U.S. at 629. The government should bear the burden of proving the statute's constitutionality, and it should be required to do so by showing, at a minimum, that the sexual orientation classification is closely related to an important governmental interest. *Cf. Virginia*, 518 U.S. at 532-33.

II. No Circuit Court After *Lawrence* Has Analyzed Whether Sexual Orientation Classifications Meet The Traditional Factors For Applying Heightened Scrutiny.

A. Federal Decisions Before *Lawrence* Rejected Heightened Scrutiny By Relying On *Bowers*.

From 1986 to 2003, traditional equal protection analysis for sexual orientation classifications was cut short by the Supreme Court's decision in *Bowers*, which erroneously held that the Due Process Clause does not protect "a fundamental right . . . [for] homosexuals to engage in sodomy." *Bowers*, 478 U.S. at 190. The Supreme Court overruled *Bowers* in *Lawrence*, and emphatically declared that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. But in the meantime, the *Bowers* decision had imposed a "stigma" that "demean[ed] the lives of homosexual persons" in other areas of the law as well. *Id.* at 575. As *Lawrence* explained, "[w]hen 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." *Id.* By effectively endorsing that discrimination, *Bowers* preempted the equal protection principles that otherwise would have required subjecting sexual orientation classifications to heightened scrutiny.

By the mid-1980s, judges and commentators had begun to recognize that, under the traditional test, classifications based on sexual orientation should be

subject to heightened scrutiny.[4] But after *Bowers*, the circuit courts stopped examining the heightened-scrutiny factors and instead interpreted *Bowers* to categorically foreclose gay people from being treated as a suspect or quasi-suspect class, even if they would have received such protections under the traditional equal protection analysis.[5] For example, in its first sexual orientation equal protection decision to consider the issue after *Bowers*, the D.C. Circuit reasoned:

> If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987). Other circuit courts quickly embraced the D.C. Circuit's analysis. To the extent that courts discussed the suspect-classification factors at all, they did so in a cursory fashion and with the

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[4] *See, e.g.*, *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (sexual orientation classifications should be "subject to strict, or at least heightened, scrutiny"); John Hart Ely, *Democracy & Distrust* 162-64 (1980); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985); Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed. 1988).

[5] *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267-68 (6th Cir. 1995); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996).

assumption that the only characteristic uniting gay people as a class was their propensity to engage in intimate activity that, at the time, was allowed to be criminalized.

By contrast, the few lower courts that actually engaged in an analysis of the heightened-scrutiny factors concluded that sexual orientation must be treated as a suspect or quasi-suspect classification. But those decisions were uniformly reversed or superseded by court of appeals decisions relying on *Bowers*.[6] Judges Norris and Canby on the Ninth Circuit forcefully argued that *Bowers* should not prevent courts from properly applying the traditional heightened-scrutiny analysis. *Watkins v. U.S. Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (en banc) (Norris, J., concurring); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of reh'g en banc). But the majority of their colleagues viewed *Bowers* as an absolute barrier to heightened scrutiny. *See High Tech Gays*, 895 F.2d at 571 (holding that *Bowers* precluded

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[6] *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis.), *rev'd*, 881 F.2d 454 (7th Cir. 1989); *Jantz v. Muci*, 759 F. Supp. 1543, 1546-51 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995); *see also Able v. United States*, 968 F. Supp. 850, 864 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998) (based on concession from counsel that plaintiffs intended to rely only on rational-basis review).

sexual orientation from being recognized as a suspect classification); *High Tech Gays*, 909 F.2d at 376 (denying reh'g en banc).

B. Federal Appellate Decisions After *Lawrence* Have Improperly Adhered To Pre-*Lawrence* Precedent Without Applying A Proper Heightened-Scrutiny Analysis.

By overruling *Bowers*, the Supreme Court in *Lawrence* effectively revoked that decision's "invitation to subject homosexual persons to discrimination." 539 U.S. at 575. After carefully analyzing the pre-*Lawrence* decisions that relied on *Bowers* to deny heightened scrutiny for sexual orientation classifications, the Executive Branch has correctly concluded that "the reasoning of these circuit decisions thus no longer withstands scrutiny." U.S. Brief at 34. Now that *Lawrence* has overruled *Bowers*, courts should resume the proper heightened-scrutiny analysis that *Bowers* cut short.

Further, in overruling *Bowers*, the Supreme Court in *Lawrence* rejected the logic of those courts that attempted to distinguish discrimination based on "homosexual conduct" from invidious discrimination against gay people as a class. *High Tech Gays*, 895 F.2d at 573; *see also Ben-Shalom*, 881 F.2d at 464; *Woodward*, 871 F.2d at 1076. As *Lawrence* explained, "[w]hen 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." *Lawrence*, 539 U.S. at 575 (emphasis added); *accord id.* at 583 (O'Connor, J., concurring in

judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."). Indeed, applying *Lawrence*, the Court in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), recently rejected a litigant's argument that a prohibition on same-sex intimate conduct is different from discrimination against gay people. *Id*. at 2990. The Court explained that "[o]ur decisions have declined to distinguish between status and conduct in this context." *Id*.[7]

Some circuit courts have held that sexual orientation discrimination is not subject to heightened scrutiny, even after *Lawrence*. But those decisions simply followed outdated cases that relied on *Bowers* instead of engaging in a proper analysis of the heightened-scrutiny factors.[8] In several cases the parties had not

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[7] *See also Karouni v. Gonzales*, 399 F.3d 1163, 1172-73 (9th Cir. 2005) (rejecting attempt to distinguish between discrimination based on "status as a homosexual" and discrimination based on "homosexual acts"); *Pedersen*, 2012 U.S. Dist. LEXIS 106713, at * 85-86; *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012), *appeal docketed*, Nos. 12-15388, 12-15409 (9th Cir. Feb. 24, 2012).

[8] *See, e.g., Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 n.9 (10th Cir. 2008); *Witt v. U.S. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *see*

submitted briefs on the appropriate standard of scrutiny or otherwise presented the issue to the court.[9] The only post-*Lawrence* circuit court decision that does not rely on *Bowers* and its progeny is *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), which upheld a state constitutional amendment barring same-sex couples from marrying. But instead of applying the framework established by the Supreme Court to determine whether sexual orientation classifications require heightened scrutiny, the *Bruning* panel tautologically concluded that rational-basis review should apply to classifications based on sexual orientation because a rational basis allegedly existed for such classifications in some circumstances. *Bruning*, 455 F.3d at 867-68.[10] Yet if suspect classifications always failed rational-basis review, there would be no need for heightened

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generally Arthur S. Leonard, *Exorcizing the Ghosts of* Bowers v. Hardwick: *Uprooting Invalid Precedents*, 84 Chi.-Kent L. Rev. 519 (2009).

[9] *See, e.g.*, *Price-Cornelison*, 524 F.3d at 1113 n.9 (noting that plaintiff argued in the district court that "lesbians comprise a suspect class, warranting strict scrutiny, . . . [but] does not reassert that claim now on appeal"); *Witt*, 527 F.3d at 823 (Canby, J., dissenting in part) (noting that plaintiff had not argued on appeal that sexual orientation classifications should receive heightened scrutiny); *see also Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (qualified-immunity case discussing the level of scrutiny during the period from 2000 to 2002 but not addressing what the standard of scrutiny should be after *Lawrence*).

[10] The court apparently concluded that because same-sex couples cannot procreate by accident, there exists a rational basis for distinguishing between same-sex and different-sex couples for purposes of conferring the benefits of marriage. *See Bruning*, 455 F.3d at 867-68. *Amici* agree with Plaintiff that the "responsible procreation" theory is not a rational basis for disparate treatment of gay people. *See* Brief of Plaintiff-Appellee at 30-31, 46-48.

scrutiny. The whole point of heightened scrutiny is that the courts must go beyond rational-basis review and require a stronger justification from the government when certain classifications have historically been prone to abuse. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) ("a shred of truth" is not enough to justify the use of invidious stereotypes); *cf. Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) (discrimination against women jurors cannot be justified "on merely rational grounds") (footnote omitted).

In *Massachusetts*, the First Circuit recently held that prior precedent within that circuit foreclosed heightened scrutiny, but that DOMA nonetheless warranted—and failed—a properly applied rational-basis review. 682 F.3d at 8, 9. This Court faces no similar precedential constraints to determining that heightened scrutiny is warranted for classifications discriminating on the basis of sexual orientation.

In deciding whether heightened scrutiny applies, this Court should look for guidance to recent decisions that have carefully examined the heightened-scrutiny test and concluded that sexual orientation must be recognized as a suspect or quasi-suspect classification—including the decision of a district court within this Circuit. *See Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *51-52; *see also Golinski*, 824 F. Supp. 2d at 985-90; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012); *Kerrigan v. Comm'r of Pub. Health*,

957 A.2d 407, 426-62 (Conn. 2008) (analyzing federal precedent to interpret state constitution); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009) (same); *In re Marriage Cases*, 183 P.3d 384, 442-44 (Cal. 2008) (analyzing factors that parallel the federal test).

III. Under The Traditional Heightened-Scrutiny Test, Classifications Based On Sexual Orientation Must Be Recognized As Suspect Or Quasi-Suspect.

A. The Most Important Heightened Scrutiny Factors Are Whether A Classified Group Has Suffered A History Of Discrimination And Whether The Classification Has Any Bearing On A Person's Ability To Perform In Or Contribute To Society.

As explained above, when determining whether a classification should be subjected to heightened scrutiny the Supreme Court has focused on two essential factors: (1) whether a classified group has suffered a history of invidious discrimination, and (2) whether the characteristic distinguishing the group's members has any bearing on the members' ability to perform in or contribute to society. *See Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *42; *Kerrigan*, 957 A.2d at 426; *Varnum*, 763 N.W.2d at 889; *In re Marriage Cases*, 183 P.3d at 443. The Supreme Court has occasionally considered two others factors to supplement its analysis: whether the characteristic is immutable or an integral part of a person's identity, and whether the group is a minority or without sufficient power to protect itself in the political process.

As discussed below, sexual orientation easily satisfies the two critical factors of history of discrimination and ability to perform in or contribute to society. This Court should therefore subject sexual orientation classifications to heightened scrutiny regardless of whether sexual orientation also satisfies the factors of immutability and political powerlessness. But even if this Court chooses to consider the factors of immutability and political powerlessness, sexual orientation satisfies those additional factors as well.

B. Gay People Have Suffered A History Of Purposeful Unequal Treatment, And Their Sexual Orientation Has No Bearing On Their Ability To Perform In Or Contribute To Society.

Sexual orientation plainly satisfies the two essential heightened scrutiny factors. There is no question that gay people have suffered a long history of invidious discrimination. The long and painful history of that discrimination—which continues to this day—has been recounted at length by numerous courts and by the government. *See Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *53-64; *Golinski*, 824 F. Supp. 2d at 985-86; *Perry*, 704 F. Supp. 2d at 981-91; U.S. Brief at 15-25.

It is similarly well established that sexual orientation does not bear any relationship to a person's ability to perform in or contribute to society.[11] Although

[11] *See, e.g.*, *Watkins*, 875 F.2d at 725 (Norris, J., concurring in the judgment); *Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *64-70; *Perry*, 704 F. Supp. 2d at

homosexuality once was stigmatized as a mental illness, the American Psychiatric Association and the American Psychological Association made clear decades ago that a person's sexual orientation is not correlated with any "impairment in judgment, stability, reliability or general social and vocational capabilities." Am. Psychiatric Ass'n, *Resolution* (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974); *see also Golinski*, 824 F. Supp. 2d at 986; *Perry*, 704 F. Supp. 2d at 967; *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975) (reflecting a similar American Psychological Association statement).

In short, a person's sexual orientation is rarely, if ever, relevant to any legitimate policy objective of the government. *Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *64-70; *Golinski*, 824 F. Supp. 2d at 993-95; U.S. Brief at 32.

C. Sexual Orientation Is Sufficiently "Immutable" To Warrant Heightened Scrutiny.

Many courts and commentators have questioned whether examining a characteristic's "immutability" should play any role when determining whether heightened scrutiny applies.[12] But even assuming that such an inquiry is relevant,

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1002; *Equality Found.*, 860 F. Supp. at 437; *Varnum*, 763 N.W.2d at 890; *Kerrigan*, 957 A.2d at 435; *Dean v. Dist. of Columbia*, 653 A.2d 307, 345 (D.C. 1995).

[12] The Supreme Court has rejected claims of heightened scrutiny for groups that are defined by immutable characteristics and granted it for groups that are not.

courts and jurists have recognized that sexual orientation is "immutable" for all pertinent purposes here, regardless of whether, or to what degree, it is biologically determined. S*ee, e.g.*, *High Tech Gays*, 909 F.2d at 377 (Canby, J., dissenting); *Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *70-90; *Golinski*, 824 F. Supp. 2d at 986-87; *Able*, 968 F. Supp. at 863-64; *Equality Found.*, 860 F. Supp. at 426; *Jantz*, 759 F. Supp. at 1548.

"[T]he consensus in the scientific community is that sexual orientation is an immutable characteristic." *Golinski*, 824 F. Supp. 2d at 986 (citing G.M. Herek, et al. *Demographic, Psychological, and Social Characteristics of Self–Identified Lesbian, Gay, and Bisexual Adults* 7, 176-200 (2010)); *Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *72; *see also Perry*, 704 F. Supp. 2d at 966; U.S. Brief at 26. Although some individuals have reported experiencing changes in their sexual orientation, there is no evidence that such changes can be made through an intentional decision-making process or by medical intervention. *See Plyler*, 457 U.S. at 216 n. 14 (explaining that discrimination based on immutable

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See, e.g., *Cleburne*, 473 U.S. at 442 n.10 (disability classifications not subject to heightened scrutiny despite sometimes being immutable); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (alienage classifications subject to heightened scrutiny despite aliens' ability to naturalize); *Kerrigan*, 957 A.2d at 427 n.20 (noting that the Supreme Court has frequently omitted any reference to "immutability" when describing the heightened-scrutiny test); *see also Cleburne*, 473 U.S. at 442 n.10 (criticizing reliance on immutability as a factor); John Hart Ely, *Democracy and Distrust* 150 (1980) (same).

characteristics often warrants heightened scrutiny because it unfairly burdens groups based on "circumstances beyond their control"); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (same).

Whether gay or straight, a person's sexual orientation is an integral component of a person's identity, and *Lawrence* made clear that gay people cannot be required to sacrifice this central part of their identity any more than heterosexual people may be required to do so. *Lawrence*, 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."). Classifications based on sexual orientation thus raise the specter that a legislative majority seeks to impose burdens on gay people that they would be unwilling to accept if applied to their own lives. *Cf. Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976) (explaining that risk of invidious discrimination based on age is lessened by fact that old age "marks a stage that each of us will reach if we live out our normal life span").

Accordingly, courts have recognized that the fundamental question is not whether a characteristic is theoretically alterable for some, but instead whether it is an integral component of a person's identity that an individual should not be compelled to change, even if theoretically possible, in order to avoid discriminatory treatment. *See, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual identity is inherent to one's very identity as a

person."), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *Watkins*, 875 F.2d at 726 (Norris, J., concurring in the judgment) (immutability describes "traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them"); *Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *90 ("Where there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity, the characteristic should be considered immutable and an individual should not be required to abandon it."); *Golinksi*, 824 F. Supp. 2d at 987 ("[A] person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it."); *In re Marriage Cases*, 183 P.3d at 442 ("[A] person's sexual orientation is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.").

Before *Lawrence*, some lower courts concluded that sexual orientation is not a sufficiently immutable classification to warrant heightened scrutiny. Those courts, however, reached that conclusion by relying on a false distinction between sexual orientation and sexual conduct, reasoning that behavior—unlike status—is not immutable.[13] That distinction between sexual orientation and sexual conduct

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[13] *See, e.g.*, *Equality Found.*, 54 F.3d at 267; *High Tech Gays*, 895 F.2d at 573-74; *Woodward*, 871 F.2d at 1076.

has now been squarely repudiated by the Supreme Court in *Lawrence* and *Christian Legal Society*. *See Lawrence*, 539 U.S. at 575; *id.*, at 583 (O'Connor, J., concurring in judgment); *Christian Legal Soc'y*, 130 S. Ct. at 2990 (2010); *supra* at Section II.B. *Lawrence* and *Christian Legal Society* erase any doubt that sexual orientation, for constitutional purposes, is an immutable characteristic that is an integral part of a person's identity and warrants heightened scrutiny by the courts.

D. Gay People Are Uniquely Disadvantaged In The Political Arena.

Finally, to the extent that being a minority or lacking political power is relevant to the heightened-scrutiny test, gay people are clearly a small minority and experience more than enough political disadvantages to merit the protection of heightened scrutiny. The continuing political powerlessness of gay people has been recounted in depth by other courts and the Executive Branch. *See*, *e.g.*, *Pedersen*, 2012 U.S. Dist. LEXIS 106713, at *91-110; *Golinski*, 284 F. Supp. 2d at 987-89; *Perry*, 704 F. Supp. 2d at 943-44, 987-88; *Kerrigan*, 957 A.2d at 444-47, 452-54; U.S. Brief at 28-30.

Against the weight of this evidence, some courts have asserted that because gay people have received some modest legal protections, sexual orientation should not be treated as a suspect or quasi-suspect classification. *See High Tech Gays*, 895 F.2d at 574; *Ben-Shalom*, 881 F.2d at 466 n.9. That analysis fundamentally misconstrues the Supreme Court's equal protection precedents. The Court has

never construed the concept of political powerlessness to mean that a group is unable to secure *any* protections for itself through the normal political process.

When the Supreme Court first began discussing heightened-scrutiny factors, women already had far more legislative protection from discrimination than gay people have today. *See Kerrigan*, 957 A.2d at 441-44; U.S. Brief at 30. By the time the *Frontiero* plurality recognized sex as a suspect or quasi-suspect classification, Congress already had passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. *See Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality); *Kerrigan*, 957 A.2d at 451-53. These legislative protections did not eradicate invidious discrimination on the basis of sex, which continues to this day. And the existence of these protections did not stop the Supreme Court from holding that discrimination on the basis of sex must be subjected to heightened scrutiny.

The limited protections currently provided to gay people do not approach the legislative protections for the rights of women in place at the time classifications based on sex were deemed suspect by the courts. There is no federal legislation expressly prohibiting discrimination on the basis of sexual orientation in employment or education, as there was on the basis of sex when *Frontiero* was decided. Indeed, no federal legislation had ever been passed to protect people on the basis of their sexual orientation until sexual orientation was added to the

federal hate crimes laws in 2009. *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2190, 2835-44 (2009). Congress only recently authorized the repeal of the military's ban on gay service members, and it did so only after two courts declared the ban unconstitutional.[14] Even the small steps the Obama administration has taken to ameliorate discrimination in the benefits paid to gay federal employees have been stymied by interpretations of DOMA.[15]

Moreover, when gay people have secured minimal protections in state courts and legislatures, opponents have aggressively used state ballot initiative and referendum processes to repeal laws or even to amend state constitutions. The initiative process has now been used more successfully against gay people than against any other social group.[16] This extraordinary use of ballot measures to preempt the normal legislative process and withdraw protections from gay people

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[14] *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated* 658 F.3d 1162 (9th Cir. 2011); *Witt v. U.S. Dep't of Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010).

[15] *See* Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re Federal Benefits and Non-Discrimination (June 17, 2009), *available at* http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri.

[16] *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997) (calculating high rate of success of anti-gay ballot initiatives); Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 312-13 (2007) (same).

vividly illustrates the continuing disadvantages that gay people face in the political arena. *Cf. Carolene Prods.*, 304 U.S. at 153 n.4 (noting that heightened scrutiny is warranted when majority prejudice "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

There is, in sum, no basis for concluding that the limited protections currently provided to gay people "belie[] a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443. To the contrary, recent history has shown that gay people are uniquely vulnerable in the majoritarian political arena and have been unable to rely on the traditional legislative processes to protect them from invidious discrimination. That vulnerability warrants heightened scrutiny by the courts.

IV. This Court Should Invalidate DOMA By Applying Heightened Scrutiny, Not Rational-Basis Review.

Amici agree with Plaintiff that DOMA fails to survive constitutional review under any level of scrutiny. *Amici* nevertheless urge the Court to decide this case by concluding that sexual orientation is a suspect or quasi-suspect classification, and subjecting DOMA to heightened scrutiny.

This case does not implicate the doctrine of constitutional avoidance because whatever standard of scrutiny it applies, the Court will have to rest its decision on constitutional grounds. *See* Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. Cal.

Rev. L. & Soc'l J. 209, 231 n.51 (2009) (distinguishing between doctrine of constitutional avoidance and "selection among constitutional arguments already fairly presented"). The Court has discretion to choose among possible grounds for a decision, and it is sometimes more appropriate to decide an important issue of law than to leave the issue unresolved. Leaving important questions unresolved can impose significant burdens on future litigants and courts that do not know what legal standard will be applied to resolve disputes, as well as perpetuate uncertainty about the legality of government discrimination against vulnerable minority groups.

In this case, leaving the standard of scrutiny unresolved and invalidating DOMA under rational-basis review would not necessarily be the more "minimalist" approach. To the contrary, by concluding that DOMA fails heightened scrutiny, this Court may avoid deciding the additional question of whether DOMA also fails the more deferential rational-basis test. *Cf. Varnum*, 763 N.W.2d at 899 n.26 ("[W]e do not address whether there is a rational basis for the marriage statute, as the sexual-orientation classification made by the statute is subject to a heightened standard of scrutiny."). Leaving the standard of scrutiny undecided would also waste judicial resources by forcing litigants in every case, such as in the present one, to build a record supporting or opposing a law under several different potential standards of review. To preserve the argument that

sexual orientation should be recognized as a suspect or quasi-suspect factor, litigants must devote time, resources, and briefing space in every case to explain why the traditional suspect classification test justifies heightened review. Lower courts are repeatedly called upon to address the question, with conflicting intra-Circuit approaches, as demonstrated in the decision below and *Pedersen*.

With so much at stake for so many people, the Court should decide the issue in this case, where the record has been carefully established and the issue squarely presented by Plaintiff. This Court should "say what the law is," and make clear that sexual orientation classifications must be subjected to heightened scrutiny. *See Marbury*, 1 Cranch at 177. A decision that leaves the appropriate standard of scrutiny unresolved will subject gay people to continued discrimination until this Circuit has the opportunity to address the issue again. Indeed, leaving the standard of scrutiny undecided has in the past been misinterpreted by lower courts as an affirmative decision that rational basis—and not heightened scrutiny—is the appropriate standard of review, which might be used to justify discrimination that purportedly clears the threshold of minimal rationality.[17] This Court should not needlessly allow such discrimination to continue. Now that *Bowers* has been firmly overruled, this Court has the opportunity to provide gay people with the

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[17] *See, e.g.*, *Richenberg*, 97 F.3d at 260 n.5; *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (1997); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002).

critical constitutional framework of protections to which they are entitled under a proper equal protection analysis. *Amici* urge this Court to do so.

CONCLUSION

The Court should hold that sexual orientation discrimination must be subjected to heightened scrutiny and, on that basis, affirm the district court's decision.

DATED: September 7, 2012

Respectfully submitted,

By: /s/ *Susan L. Sommer*
Susan L. Sommer
LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.
120 Wall Street, 19th floor
New York, NY 10005
(212) 809-8585
ssommer@lambdalegal.org

Shannon P. Minter
Christopher F. Stoll
NATIONAL CENTER
FOR LESBIAN RIGHTS
870 Market Street, #370
San Francisco, CA 94102
(415) 392-6257

Timothy S. Fisher
Brian P. Rice
MCCARTER & ENGLISH, LLP
Cityplace I
185 Asylum Street
Hartford, CT 06103
(860) 275-6775

Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,743 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 7, 2012

/s/ Susan L. Sommer
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on September 7, 2012.

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