

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

Case Nos. 14-14061-AA, 14-14066-AA

---

JAMES DOMER BRENNER, et al.,

*Plaintiffs-Appellees,*

v.

JOHN ARMSTRONG, et al.,

*Defendants-Appellants.*

SLOAN GRIMSLEY, et al.,

*Plaintiffs-Appellees,*

v.

JOHN ARMSTRONG, et al.,

*Defendants-Appellants.*

---

Appeals from the United States District Court for the Northern District of Florida

---

**BRIEF OF *AMICI CURIAE* LEADERSHIP CONFERENCE ON CIVIL AND  
HUMAN RIGHTS, PUBLIC INTEREST ORGANIZATIONS, AND BAR  
ASSOCIATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES**

---

Shannon P. Minter  
Christopher F. Stoll  
NATIONAL CENTER FOR LESBIAN RIGHTS  
1100 H Street, NW, Suite 540  
Washington, DC 20005  
Telephone: (202) 734-3545  
Facsimile: (415) 392-8442

*Counsel for Amici Curiae*

*This brief is filed on behalf of the following organizations:*

**Leadership Conference on Civil and Human Rights**

**API Equality-LA**

**Asian Americans Advancing Justice | AAJC**

**Asian Americans Advancing Justice – Asian Law Caucus**

**Asian Americans Advancing Justice -- Chicago**

**Asian Americans Advancing Justice | Los Angeles**

**Human Rights Campaign**

**League of United Latin American Citizens**

**Marriage Equality USA**

**National Black Justice Coalition**

**National Center for Lesbian Rights**

**National LGBT Bar Association**

**National LGBTQ Task Force**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, 11th Cir. Rules 26.1-1 through 26.1-3, and 11th Cir. Rules 27-1(9) and 29-1, undersigned counsel hereby certify that no *amicus* has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any *amicus*. Moreover, and pursuant to the aforementioned appellate rules, undersigned counsel also certify that below is a list of persons and entities who may be interested in the outcome of this case:

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc., The

Albu, Joyce

Andrade, Carlos

API Equality-LA

Armstrong, Dr. John H.

Asian Americans Advancing Justice | AAJC

Asian Americans Advancing Justice – Asian Law Caucus

Asian Americans Advancing Justice -- Chicago

Asian Americans Advancing Justice | Los Angeles

Ausley & McMullen, P.A.

Bazzell, Harold

Bledsoe, Schmidt & Wilkinson, P.A.

Bondi, Pamela Jo

Brenner, James Domer

Collier, Bob

Cooper, Leslie

Crampton, Stephen M.

Del Hierro, Juan

DeMaggio, Bryan E.

Emmanuel, Stephen C.

Fitzgerald, John

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

Gantt, Thomas, Jr.

Goldberg, Arlene

Goldwasser, Carol (deceased)

Goodman, James J., Jr.

Graessle, Jonathan W.

Grimsley, Sloan

Hankin, Eric

Hinkle, Hon. Robert L.

Hueso, Denise

Human Rights Campaign

Humlie, Sarah

Hunziker, Chuck

Jacobson, Samuel

Jacobson Wright & Sussman, P.A.

Jones, Charles Dean

Kachergus, Matthew R.

Kayanan, Maria

Leadership Conference on Civil and Human Rights

League of United Latin American Citizens

Liberty Counsel, Inc.

Liberty Counsel Action, Inc.

Loupo, Robert

Marriage Equality USA

Mihet, Horatio G.

Milstein, Richard

Minter, Shannon P.

Myers, Lindsay

National Black Justice Coalition

National Center for Lesbian Rights

National LGBT Bar Association

National LGBTQ Task Force

Newson, Sandra

Nichols, Craig J.

Podhurst Orseck, P.A.

Rosenthal, Stephen F.

Russ, Ozzie

Save Foundation, Inc.

Schlairet, Stephen

Scott, Rick

Sevier, Chris

Sheppard, White, Kachergus and DeMaggio, P.A.

Sheppard, William J.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Stoll, Christopher F.

Tanenbaum, Adam S.

Tilley, Daniel B.

Ulvert, Christian

White, Elizabeth L.

Winsor, Allen C.

Dated: December 19, 2014

/s Christopher F. Stoll

Shannon Minter  
Christopher F. Stoll  
National Center for Lesbian Rights  
870 Market Street, Suite 370  
San Francisco, CA 94102  
Tel: 415.392.6257  
Fax: 415.392.8442  
SMinter@nclrights.org  
CStoll@nclrights.org

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	4
I. Classifications That Are Irrelevant Or Rarely Relevant To Government Decision-Making Receive Heightened Scrutiny Under The Equal Protection Clause.....	4
II. Under Supreme Court Precedent, Laws That Discriminate On The Basis Of Sexual Orientation Are Subject To Heightened Scrutiny .....	6
A. Federal Decisions Before <i>Lawrence</i> Rejected Heightened Scrutiny By Relying on <i>Bowers</i> , But <i>Lawrence</i> Removed Any Impediment To Recognizing That Sexual Orientation Classifications Warrant Heightened Scrutiny .....	6
B. <i>Windsor</i> Confirms That Heightened Scrutiny Is Warranted For Laws That Discriminate On The Basis Of Sexual Orientation .....	13
III. Classifications Based On Sexual Orientation Warrant Heightened Scrutiny Under the Traditional Framework.....	16
A. Gay, Lesbian, And Bisexual People Have Suffered A Long History Of Discrimination .....	17
B. Sexual Orientation Has No Bearing On Ability To Perform In Or Contribute To Society.....	19
C. Sexual Orientation Is An Immutable Characteristic And An Integral Part Of Identity That Defines A Discrete Group .....	20
D. Gay, Lesbian, and Bisexual People Are A Small And Politically Vulnerable Minority .....	23
CONCLUSION .....	27

CERTIFICATE OF COMPLIANCE..... 29  
CERTIFICATE OF SERVICE ..... 30  
APPENDIX ..... A-1

## TABLE OF AUTHORITIES

### Cases

<i>Able v. U.S.</i> , 968 F. Supp. 850 (E.D.N.Y. 1997).....	21
<i>Baskin v. Bogan</i> , 766 F.3d 648 (7th Cir. 2014).....	9, 10
<i>Ben-Shalom v. Marsh</i> , 881 F.2d 454 (7th Cir. 1989).....	8, 9, 18, 24
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986).....	3, 7, 8
<i>Cf. United States v. Carolene Prods. Co.</i> , 304 U.S. 144 (1938).....	26
<i>Christian Legal Society v. Martinez</i> , 130 S. Ct. 2971 (2010).....	11
<i>Citizens for Equal Protection v. Bruning</i> , 455 F.3d 859 (8th Cir. 2006).....	12
<i>City of Cleburne, Tex. v. City of Cleburne Living Ctr.</i> , 472 U.S. 432 (1985).....	5, 7, 21, 27
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297 (1976).....	5
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	5
<i>Davis v. Singletary</i> , 119 F.3d 1471 (11th Cir. 1997).....	13
<i>Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati</i> , 54 F.3d 261 (6th Cir. 1995).....	8, 9, 19, 21
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	5, 16, 24

*Golinski v. Office of Pers. Mgmt.*,  
824 F. Supp. 2d 968 (N.D. Cal. 2012)..... 18, 20, 21, 23

*Grutter v. Bollinger*,  
539 U.S. 306 (2003) .....6

*Hernandez-Montiel v. I.N.S.*,  
225 F.3d 1084 (9th Cir. 2000) .....22

*High Tech Gays v. Def. Indus. Sec. Clearance Office*,  
895 F.2d 563 (9th Cir. 1990)..... passim

*Holmes v. Cal. Army Nat'l Guard*,  
124 F.3d 1126 (9th Cir. 1997) .....9

*In re Marriage Cases*,  
183 P.3d 384 (Cal. 2008)..... 16, 23

*J.E.B. v. Alabama*,  
511 U.S. 127 (1994) .....15

*Jantz v. Muci*,  
976 F.2d 623 (10th Cir. 1992) .....8, 21

*Kerrigan v. Comm’r of Pub. Health*,  
957 A.2d 407 (Conn. 2008)..... passim

*Latta v. Otter*,  
771 F.3d 456 (9th Cir. 2014) .....15

*Lawrence v. Texas*,  
539 U.S. 558 (2003) ..... passim

*Lofton v. Sec’y of the Dep’t of Children & Family Servs.*,  
358 F.3d 804 (11th Cir. 2004) .....9

*Log Cabin Republicans v. United States*,  
716 F. Supp. 2d 884 (C.D. Cal. Oct. 12, 2010) .....26

*Mass Bd. of Ret. v. Murgia*,  
427 U.S. 307 (1976) .....5, 17

*Massachusetts v. U.S. Dep't of Health & Human Servs.*,  
682 F.3d 1 (1st Cir. 2012) .....12

*Mathews v. Lucas*,  
427 U.S. 495 (1976) .....16

*Nyquist v. Mauclet*,  
432 U.S. 1 (1977) .....21

*Padula v. Webster*,  
822 F.2d 97 (D.C. Cir. 1987).....8

*Pedersen v. Office of Pers. Mgmt.*,  
881 F. Supp. 2d 294 (D. Conn. 2012) .....18

*Perry v. Schwarzenegger*,  
704 F. Supp. 2d 921 (N.D. Cal. 2010)..... passim

*Plyler v. Doe*,  
457 U.S. 202 (1982) .....5

*Price-Cornelison v. Brooks*,  
524 F.3d 1103 (10th Cir. 2008) .....12

*Rich v. Sec'y of the Army*,  
735 F.2d 1220 (10th Cir. 1984) .....9

*Richenberg v. Perry*,  
97 F.3d 256 (8th Cir. 1996) .....8, 9

*Romer v. Evans*,  
517 U.S. 620 (1996) .....5, 6

*Rowland v. Mad River Local Sch. Dist.*,  
470 U.S. 1009 (1985) .....8, 18

*SmithKline Beecham Corp. v. Abbott Labs.*,  
740 F.3d 471 (9th Cir. 2014) ..... 9, 10, 15

*Steffan v. Perry*,  
41 F.3d 677 (D.C. Cir. 1994).....9

*Thomas v. Gonzales*,  
409 F.3d 1177 (9th Cir. 2005) .....23

*Thomasson v. Perry*,  
80 F.3d 915 (4th Cir. 1996) .....9

*Town of Ball v. Rapides Parish Police Jury*,  
746 F.2d 1049 (5th Cir. 1984) .....9

*Tuan Anh Nguyen v. INS*,  
533 U.S. 53 (2001) .....2

*United States v. Virginia*,  
518 U.S. 515 (1996) ..... 2, 6, 20

*United States v. Windsor*,  
133 S. Ct. 2675 (2013)..... passim

*Varnum v. Brien*,  
763 N.W.2d 862 (Iowa 2009)..... 16, 19

*Watkins v. United States Army*,  
875 F.2d 699 (9th Cir. 1989) ..... 19, 23

*Windsor v. United States*,  
699 F.3d 169 (2d Cir. 2012) ..... passim

*Witt v. Dep’t of Air Force*,  
527 F.3d 806 (9th Cir. 2008) ..... 12, 18, 26

*Woodward v. United States*,  
871 F.2d 1068 (Fed. Cir. 1989) .....8, 9

**Statutes and Regulations**

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act,  
Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2190, 2835-44 (2009) .....25

**Other Authorities**

Am. Psychiatric Ass’n,  
*Resolution*, (Dec. 15, 1973), reprinted in 131 Am. J. Psychiatry 497 (1974) .....19

Am. Psychological Ass’n,  
*Report of the American Psychological Association Task Force on Appropriate  
Therapeutic Responses to Sexual Orientation*, at v (2009).....22

Arthur S. Leonard,  
*Exorcizing the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84  
Chi.-Kent L. Rev. 519 (2009).....12

Barbara S. Gamble,  
*Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997).....26

Brief for the United States on the Merits Question,  
*United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL  
683048 ..... 18, 21, 24

Donald P. Haider-Markel *et al.*,  
*Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority  
Rights*, 60 Pol. Res. Q. 304 (2007).....26

Douglas C. Haldeman,  
*The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J.  
Consulting & Clinical Psychol. 221 (1994) .....22

G.M. Herek, *et al.*,  
*Demographic, Psychological, and Social Characteristics of Self-Identified  
Lesbian, Gay, and Bisexual Adults*, 7 (2010).....21

John Hart Ely,  
*Democracy & Distrust* 162-64 (1980).....8, 21

Letter from the Attorney General to Congress on Litigation Involving the Defense  
of Marriage Act (Feb. 23, 2011).....11

*Minutes of the Annual Meeting of the Council of Representatives*,  
30 Am. Psychologist 620, (1975).....19

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are a coalition of thirteen civil and human rights groups, public interest organizations, and bar associations committed to preventing, combatting, and redressing discrimination and protecting the equal rights of women and minorities in the United States, including African-Americans, Latinos, Asian Americans and Pacific Islanders, and lesbian, gay, bisexual, and transgender individuals.<sup>2</sup> *Amici* submit this brief in support of Appellants 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. All *amici* have given their authorization to have this brief filed on their behalf.

---

<sup>1</sup> The parties have consented to the filing of this brief. Substantially similar briefs were submitted by many of the same *amici curiae* and by the same counsel in other cases challenging the constitutionality of the federal Defense of Marriage Act and state laws excluding same-sex couples from marriage. The American Civil Liberties Union, counsel to Plaintiffs-Appellees here, participated in drafting previous versions of this brief that were filed in other cases. 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.

<sup>2</sup> A brief description of each *amicus* is included herein as Appendix A.

## SUMMARY OF THE ARGUMENT

This Court should hold that laws that discriminate against gay, lesbian, and bisexual persons, including state laws that exclude same-sex couples from marriage, are subject to heightened scrutiny under the Equal Protection Clause. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court observed that whether “heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation” is an issue “still being debated and considered in the courts.” *Id.* at 2683-84. In affirming the judgment of the Second Circuit in that case, the Court left undisturbed the Second Circuit’s holding that laws that discriminate based on sexual orientation should be scrutinized under the same heightened standard that the Supreme Court has applied to sex-based classifications.<sup>3</sup> *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012). Moreover, the Supreme Court in *Windsor* determined that Section 3 of the Defense of Marriage Act (“DOMA”) could not

---

<sup>3</sup> The Second Circuit used both the term “heightened scrutiny” and the term “intermediate scrutiny” to describe the inquiry required of laws that discriminate based on sex or sexual orientation. *See Windsor*, 699 F.3d at 185. This brief will use the phrase “heightened scrutiny,” except when quoting authorities. *See United States v. Virginia*, 518 U.S. 515, 555 (1996) (using the term “heightened scrutiny” to describe the standard of review for sex-based classifications, without using the term “intermediate scrutiny” in majority opinion); *Windsor*, 133 S. Ct. at 2684) (using the term “heightened scrutiny,” but not “intermediate scrutiny”); *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 61 (2001) (same); *id.* at 74 (O’Connor, J., dissenting) (“In a long line of cases spanning nearly three decades, this Court has applied heightened scrutiny to legislative classifications based on sex.”).

withstand “careful consideration,” without examining whether that statutory provision could survive ordinary rational basis review. 133 S. Ct. at 2692. Although the Supreme Court in *Windsor* did not expressly label the level of scrutiny it applied, the Court’s analysis supports the conclusion that government discrimination based on sexual orientation warrants heightened scrutiny under the Constitution’s equal protection guarantees.

For many years, courts invoked the Supreme Court’s holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that same-sex intimate conduct could be criminalized, to conclude that government discrimination based on sexual orientation did not warrant heightened scrutiny. However, the Supreme Court overruled *Bowers* more than ten years ago in *Lawrence v. Texas*, 539 U.S. 558 (2003), acknowledging in the Court’s opinion that lesbian and gay persons had experienced a long history of discriminatory treatment and that lesbian and gay people were capable of building “enduring” relationships. *Id.* at 567.

In light of *Lawrence* and *Windsor*, earlier decisions from this Court and other circuits holding or suggesting that classifications that discriminate on the basis of sexual orientation are subject only to rational basis review no longer comport with Supreme Court precedent. Such cases, therefore, do not determine the result this Court should reach regarding the appropriate level of constitutional scrutiny. Rather, this Court should look to and apply the well-established factors that the Supreme

Court itself has used to determine whether laws that classify based on a particular personal characteristic should be subject to heightened scrutiny. Under those factors, heightened scrutiny is required where, as here, there has been a history of discrimination against a group based on a characteristic that is unrelated to one's ability to contribute to society. Heightened scrutiny is particularly warranted where, as here, the discrimination is based on a trait that is integral to one's identity and that one cannot reasonably be expected to change, and where the group is politically disadvantaged.

*Windsor* illustrates that courts should view classifications based on sexual orientation with skepticism to ensure they are not based on an improper discriminatory purpose. *Amici* urge the Court to hold that classifications based on sexual orientation are subject to heightened scrutiny. The laws challenged in these cases cannot withstand that exacting inquiry.

## ARGUMENT

### **I. Classifications That Are Irrelevant Or Rarely Relevant To Government Decision-Making Receive Heightened Scrutiny Under The Equal Protection Clause.**

In a long line of cases, the Supreme Court has developed a framework for considering whether a classification should be treated with suspicion and subjected to heightened scrutiny. The most important 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. *See Mass Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (discussing first factor); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (discussing second factor); *see also Windsor*, 699 F.3d at 181. Occasionally, the Supreme Court has considered two additional but not essential factors: (3) whether the characteristic is immutable or an integral part of a person's identity; and (4) whether the group is a minority or lacks sufficient power to protect itself in the political process. *See Windsor*, 699 F.3d at 181 ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."). No single factor is dispositive, and each can serve as a warning sign that a particular classification "provides no sensible ground for differential treatment," *City of Cleburne, Tex. v. City of Cleburne Living Ctr.*, 472 U.S. 432, 440 (1985), 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).

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

has described its review as “strict,” “heightened,” or “intermediate” scrutiny. Under any of these levels of elevated scrutiny, the Court requires the government to bear the burden of proving the statute’s constitutionality and demands at least a substantial and “exceedingly persuasive” justification. *See Virginia*, 518 U.S. at 531-33. Courts apply heightened scrutiny to such classifications in order to “smoke out” whether they reflect prejudice or stereotypes rather than a legitimate governmental purpose. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

For the reasons explained below, sexual orientation is another classification that warrants “the protection of heightened equal protection scrutiny.” *Romer*, 517 U.S. at 629. Where a statute classifies based on a person’s sexual orientation, the government should bear the burden of proving the statute’s constitutionality, by showing, at a minimum and in an “exceedingly persuasive” manner, that the classification substantially furthers an important governmental interest. *Cf. Virginia*, 518 U.S. at 532-33.

**II. Under Supreme Court Precedent, Laws That Discriminate On The Basis Of Sexual Orientation Are Subject To Heightened Scrutiny.**

**A. Federal Decisions Before *Lawrence* Rejected Heightened Scrutiny By Relying on *Bowers*, But *Lawrence* Removed Any Impediment To Recognizing That Sexual Orientation Classifications Warrant Heightened Scrutiny.**

Sexual orientation shares important features with characteristics like sex and race that first led courts to look with skepticism at classifications made on those

bases. From 1986 to 2003, however, 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, *Bowers* 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." 539 U.S. at 575. By effectively endorsing that discrimination, *Bowers* preempted the equal protection principles that otherwise would have required subjecting sexual orientation classifications to heightened scrutiny.

The Supreme Court developed a framework for deciding whether a classification should be subjected to heightened scrutiny in the decades before *Bowers*, see *City of Cleburne*, 473 U.S. at 440-41 (1985), and, based on that framework, judges and scholars alike concluded that gay, lesbian, and bisexual

people met the test.<sup>4</sup> But after *Bowers* erroneously held that laws criminalizing same-sex intimacy were constitutional under the Due Process Clause, *see* 478 U.S. at 191, most courts stopped examining the heightened-scrutiny factors and instead interpreted *Bowers* to foreclose application of heightened scrutiny to sexual orientation classifications.<sup>5</sup> These courts reasoned that, if the Constitution permitted a state to criminalize same-sex intimacy, it would make little sense to forbid a state from passing laws targeting the class of people who engaged in that conduct.<sup>6</sup> To the extent the courts discussed the heightened-scrutiny factors at all, they did so in a cursory fashion and with the assumption that the only characteristic uniting gay,

---

<sup>4</sup> *See, e.g., Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*) (arguing that classifications based on sexual orientation should receive “strict, or at least heightened, scrutiny”); John Hart Ely, *Democracy & Distrust* 162-64 (1980).

<sup>5</sup> *See, e.g., Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267-68 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996) (“*Equality Foundation I*”); *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

<sup>6</sup> *See, e.g., Padula*, 822 F.2d at 103 (“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.”).

lesbian, and bisexual people as a class was the fact that they engaged in intimate conduct that, at the time, could be criminalized.

In *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004), this Court applied rational-basis scrutiny to a statute that discriminated on the basis of sexual orientation. The Court engaged in no independent analysis of the issue, but based its holding solely on the fact that “all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class.” *Id.*<sup>7</sup> All of the out-of-circuit decisions on which this Court based its decision predated *Lawrence*, however, and many of those decisions expressly relied on *Bowers* as the basis for their conclusion that heightened scrutiny did not apply. As shown below, the logic of these precedents has been

---

<sup>7</sup> The Court cited *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (7th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984); and *Rich v. Sec’y of the Army*, 735 F.2d 1220 (10th Cir. 1984). The Ninth Circuit has expressly overruled the two cases from that Circuit on which this Court based its decision in *Lofton* and now applies heightened scrutiny to sexual orientation classifications. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014). Likewise, the Seventh Circuit applied careful scrutiny in striking down Indiana’s and Wisconsin’s marriage bans, noting that “more than a reasonable basis” was necessary to uphold the bans because they discriminate “along suspect lines.” *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014).

fundamentally undermined by the Supreme Court's subsequent decisions in *Lawrence* and *Windsor*, and as a result, it is no longer true that all of this Court's sister circuits apply rational basis scrutiny. This Court should join the Second, Seventh, and Ninth Circuits in applying heightened scrutiny to laws that discriminate based on sexual orientation. *See Windsor*, 699 F.3d at 185; *Baskin*, 766 F.3d at 654; *SmithKline*, 740 F.3d at 483.

When the Supreme Court decided *Lawrence*, it removed the barrier that *Bowers* had erected and cleared the path for traditional heightened scrutiny analysis to resume its well-established role in equal protection cases. Further, in overruling *Bowers*, the Supreme Court rejected the logic of the decisions on which *Lofton* was based, which had attempted to distinguish discrimination based on "homosexual acts" from invidious discrimination against gay people as a class. 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 Supreme Court in *Christian Legal Society v. Martinez*, 130

S. Ct. 2971 (2010), 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.*

In 2011, after carefully analyzing the pre-*Lawrence* decisions that relied on *Bowers* to deny heightened scrutiny for sexual orientation classifications, the Executive Branch undertook a review of its previous positions in cases across the country challenging Section 3 of DOMA and concluded that under any reasonable application of the Supreme Court’s test, legislative classifications based on sexual orientation do not warrant a presumption of constitutionality and instead warrant heightened scrutiny. *See* Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011).<sup>8</sup> The Second Circuit in *Windsor* accepted the Executive Branch’s position and expressly held that sexual orientation is a “quasi-suspect” classification subject to heightened scrutiny, and the Supreme Court left that holding undisturbed. *Windsor*, 699 F.3d at 185.<sup>9</sup>

---

<sup>8</sup> Available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>9</sup> The First Circuit declined to hold that sexual orientation classifications are suspect or quasi-suspect, but nevertheless held that such classifications must be subjected to a form of review that requires “a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.” *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir.

After *Lawrence* but before the Executive Branch's announcement of its position on heightened scrutiny, some circuit courts continued to hold that sexual orientation discrimination is not subject to heightened scrutiny. But, like this Court's decision in *Lofton*, those decisions followed outdated cases that relied on *Bowers* instead of examining the heightened-scrutiny factors.<sup>10</sup>

The only post-*Lawrence* circuit court decision applying ordinary rational basis review without reliance 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 factors 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. *Id.* at 867-68. Yet if suspect classifications always failed rational-basis review, then there would be no need for heightened scrutiny. The whole point

---

2012).

<sup>10</sup> See, e.g., *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 n.9 (10th Cir. 2008); *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); see generally Arthur S. Leonard, *Exorcizing the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 Chi.-Kent L. Rev. 519 (2009).

of heightened scrutiny is that the courts must require a stronger justification from the government when certain classifications have historically been prone to abuse.

After *Lawrence*, *Bowers* no longer bars the application of the traditional factors to determine whether sexual orientation classifications warrant heightened scrutiny, nor can it be relied on to avoid the question. *Lofton*'s reliance on out-of-circuit cases that based their holdings on *Bowers* is incompatible with intervening contrary decisions of the Supreme Court and should not be followed. See *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) (“To the extent of any inconsistency between our [prior opinions’] pronouncements and the Supreme Court's supervening ones, of course, we are required to heed those of the Supreme Court.”).

Rather than follow Circuit precedent whose reasoning has been rejected by subsequent Supreme Court decisions, this Court should engage in the established inquiry, which strongly supports the application of heightened scrutiny to laws targeting gay, lesbian, and bisexual people.

**B. *Windsor* Confirms That Heightened Scrutiny Is Warranted For Laws That Discriminate On The Basis Of Sexual Orientation.**

In *United States v. Windsor*, the Supreme Court struck down Section 3 of DOMA, holding that it violates the Fifth Amendment's guarantees of due process and equal protection. *Windsor*, 133 S. Ct. at 2696. Although the Supreme Court did

not label the level of scrutiny it applied, the Court's analysis supports the conclusion that laws that discriminate based on sexual orientation warrant some level of heightened scrutiny.

In *Windsor*, the Supreme Court affirmed the Second Circuit's decision, which expressly held that laws that discriminate based on sexual orientation are subject to heightened scrutiny. *See Windsor*, 699 F.3d at 185. The Supreme Court did not reverse or criticize the Second Circuit's analysis. Indeed, the Court held that Section 3 of DOMA required "careful consideration" under the Constitution's guarantees of equal protection and due process. 133 S. Ct. at 2692 (citations omitted). The Court in *Windsor* did not consider hypothetical justifications for DOMA, as an ordinary rational basis analysis would require. Instead, it examined the statute's text and legislative history to determine that DOMA's "principal purpose . . . is to impose inequality." *Windsor*, 133 S. Ct. at 2694. In addition, *Windsor* carefully considered the serious harms to same-sex couples and their families caused by DOMA's denial of recognition to their marriage and required Congress to articulate a legitimate governmental interest strong enough to "overcome[]" the "disability" on a "class" of persons. *Id.* at 2696. In holding that Section 3 of DOMA could not survive this careful review, the Court rejected all of the proffered justifications for the law, holding that "no legitimate purpose

overcomes the [statute's] purpose and effect to disparage and to injure" same-sex couples. *Id.* at 2696.

The language the Supreme Court used in concluding that Section 3 was unconstitutional because its effect was to "demean" gay, lesbian, and bisexual people is similar to the language the Court has used when discussing other discriminatory statutory classifications that are subject to heightened scrutiny. *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) ("Striking individual jurors on the assumption that they hold particular views simply because of their gender . . . denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation."). As the Ninth Circuit recently held, a careful reading of the Supreme Court's reasoning and analysis in *Windsor* makes clear that the case involved "something more than traditional rational basis review." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014) (citation and internal quotation marks omitted); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

In sum, in *Windsor*, the Supreme Court applied a form of elevated scrutiny, which it described as "careful consideration." In light of *Windsor*, and in light of the factors that the Supreme Court has long applied in determining whether a suspect or quasi-suspect classification is at issue, this Court should hold that laws that discriminate on the basis of sexual orientation are subject to heightened scrutiny.

### **III. Classifications Based On Sexual Orientation Warrant Heightened Scrutiny Under the Traditional Framework.**

The Supreme Court has developed a framework over many years for determining which classifications carry a significant risk of reflecting prejudice, and, thus, should be scrutinized more heavily to ensure that they were enacted for a proper purpose and do not reflect either intentional or unthinking bias. The most important factors in this analysis 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. *See Windsor*, 699 F.3d at 181; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008) (discussing precedents); *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009) (same); *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (analyzing factors that parallel the federal test).

In some cases, courts have considered two additional factors to supplement the analysis: 3) whether the characteristic is immutable or an integral part of one's identity, and 4) whether the group is a minority or lacks sufficient political power to protect itself through the democratic process. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Windsor*, 699 F.3d at 181. These factors are not essential; the Supreme Court has never denied heightened scrutiny review where the group in question has experienced a long

history of discrimination and where the group's defining characteristic has no bearing on the ability of persons to contribute to society.

Sexual orientation satisfies the two essential factors, as lesbian, gay, and bisexual people have suffered a long history of discrimination, and sexual orientation has no bearing on a person's ability to perform in or contribute to society. Furthermore, if the Court decides to take the optional factors into consideration as well, those factors also support the application of heightened scrutiny. Sexual orientation is an immutable characteristic that is integral to a person's identity, and gay, lesbian, and bisexual people are a small and politically vulnerable minority that lacks the power to achieve full equality through the political process.

**A. Gay, Lesbian, And Bisexual People Have Suffered A Long History Of Discrimination.**

Courts apply heightened scrutiny when a group has experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). As many courts have concluded, gay, lesbian, and bisexual people have faced a long and painful history of discrimination and persecution.<sup>11</sup> Courts have acknowledged this history in multiple

---

<sup>11</sup> See, e.g., *Windsor*, 699 F.3d at 182 ("It is easy to conclude that homosexuals have suffered a history of discrimination. . . . [W]e think it is not much in debate. Perhaps the most telling proof of animus and discrimination against homosexuals in

areas, including public employment, denial of child custody and visitation rights, denial of the ability to associate freely, and both legislative efforts and ballot initiatives targeting people on the basis of sexual orientation.<sup>12</sup> The Executive Branch also recognized this history when it stopped defending DOMA and argued that the Supreme Court should strike it down, based on its conclusion that sexual orientation classifications should be subjected to heightened scrutiny. *See* Brief for the United States on the Merits Question at 22-27, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048.

---

this country is that, for many years and in many states, homosexual conduct was criminal. These laws had the imprimatur of the Supreme Court.”); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-86 (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981-91, 997 (N.D. Cal. 2010).

<sup>12</sup> *See, e.g., Witt*, 527 F.3d at 824-25 (“[H]omosexuals have ‘experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.’”) (quoting *Murgia*, 427 U.S. at 313); *High Tech Gays*, 895 F.2d at 573 (acknowledging that “homosexuals have suffered a history of discrimination”); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465-66 (7th Cir. 1989) (“Homosexuals have suffered a history of discrimination and still do.”); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 317 (D. Conn. 2012) (“[H]omosexuals have suffered a long history of invidious discrimination.”); *Golinski*, 824 F. Supp. 2d at 985 (“There is no dispute in the record that lesbians and gay men have experienced a long history of discrimination.”); *see also Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of *certiorari*) (“[H]omosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely to reflect deep-seated prejudice rather than . . . rationality.”) (internal quotation marks omitted).

**B. Sexual Orientation Has No Bearing On Ability To Perform In Or Contribute To Society.**

It is also well established that sexual orientation does not bear any relationship to a person's ability to perform in or contribute to society, as many courts have held.<sup>13</sup> Forty years ago, the American Psychiatric Association and the American Psychological Association recognized that sexual orientation was 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); *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975); see also *Golinski*, 824 F.

---

<sup>13</sup> See, e.g., *Windsor*, 699 F.3d at 182 ("There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them."); *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society."); *Perry*, 704 F. Supp. 2d at 1002 ("The evidence shows that, by every available metric, opposite-sex couples are not better than their same-sex counterparts. . . ."); *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994) ("[S]exual orientation . . . bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society."), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996); *Varnum*, 763 N.W.2d at 890 ("Not surprisingly, none of the same-sex marriage decisions from other state courts around the nation have found a person's sexual orientation to be indicative of the person's general ability to contribute to society."); *Kerrigan*, 957 A.2d at 434 ("The defendants also concede that sexual orientation bears no relation to a person's ability to participate in or contribute to society, a fact that many courts have acknowledged, as well.").

Supp. 2d at 986; *Perry*, 704 F. Supp. 2d at 967. In short, a person’s sexual orientation is rarely, if ever, relevant to any legitimate policy objective of the government.

Indeed, laws that discriminate based on sexual orientation generally are not based on a person’s ability to participate in society, but on an improper desire to treat same-sex couples unequally, *see, e.g., Windsor*, 133 S. Ct. at 2693, or on impermissibly gendered expectations—for example, the expectation that a woman should form an intimate relationship and family with a man rather than with another woman, and the expectation that a man should form an intimate relationship and family with a woman rather than with another man. Even if such gendered assumptions or expectations are true for most people, they are not true for all, and the government has no legitimate interest in seeking to compel individuals to comply with gendered expectations that are unrelated to one’s ability to form a family or to participate in society in other ways. *Cf. Virginia*, 518 U.S. at 542 (holding that gender-based restrictions cannot be justified based on “average capacities or preferences of men and women”).

**C. Sexual Orientation Is An Immutable Characteristic And An Integral Part Of Identity That Defines A Discrete Group.**

Many courts and commentators have questioned whether examining a characteristic’s “immutability” should play any role when determining whether heightened scrutiny applies, and the Supreme Court has not treated this factor as

essential.<sup>14</sup> But even assuming that such an inquiry is relevant, courts have recognized that sexual orientation is “immutable” for all pertinent purposes here, regardless of whether, or to what degree, it is biologically determined. *See, e.g., Windsor*, 699 F.3d at 183-84; *High Tech Gays*, 909 F.2d at 377 (Canby, J., dissenting); *Golinski*, 824 F. Supp. 2d at 986-87; *Able v. U.S.*, 968 F. Supp. 850, 863-64 (E.D.N.Y. 1997) *rev’d on other grounds*, 155 F.3d 628 (2nd Cir. 1998); *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)); *Perry*, 704 F. Supp. 2d at 966; *see also* Brief for the United States on the Merits Question at 32, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048. Regardless of

---

<sup>14</sup> The Supreme Court has rejected claims of heightened scrutiny for groups that are defined by immutable characteristics and granted it for classifications that are not. *See Cleburne*, 473 U.S. at 442 n.10 (disability classifications not subject to heightened scrutiny despite being sometimes 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).

whether some small subset of individuals may experience some degree of fluidity with respect to their sexual orientation, there is no evidence that a person's sexual orientation can be changed through an intentional decision-making process or by medical intervention. See Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), [http:// www.apa.org/pi/lgbt/resources/therapeutic-response.pdf](http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf); see also Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 226 (1994) (describing "lack of empirical support for conversion therapy").

Whether gay, straight, or bisexual, a person's sexual orientation is an integral component of personal 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."). Accordingly, courts have recognized that the fundamental question is not whether a characteristic is literally unable to be changed under any circumstances, but rather whether it is an integral component of a person's identity that an individual should not be compelled to change to avoid discriminatory treatment even if it were theoretically possible to do so. See, e.g., *Hernandez-Montiel v. I.N.S.*, 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”); *Golinski*, 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.”).

Gay, lesbian, and bisexual people should not be forced to repress or disavow their sexual orientation in order to avoid discriminatory treatment. *See Lawrence*, 539 U.S. at 574; *In re Marriage Cases*, 183 P.3d at 442; *Watkins*, 875 F.2d at 725-26 (Norris, J., concurring in the judgment). In sum, while immutability is not an essential requirement in determining whether a classification warrants heightened scrutiny, sexual orientation is an immutable characteristic that is integral to a person's identity.

**D. Gay, Lesbian, and Bisexual People Are A Small And Politically Vulnerable Minority.**

Finally, to the extent that being a minority or lacking political power is relevant to the heightened-scrutiny test, gay, lesbian, and bisexual people are clearly

a small minority and experience sufficient political disadvantages to merit the protection of heightened scrutiny. The continuing political vulnerability of gay, lesbian, and bisexual people has been recounted in depth by other courts and the Executive Branch. *See Windsor*, 699 F.3d at 184; *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; Brief for the United States on the Merits Question at 32-35, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048.

Against the weight of this evidence, a few courts have asserted that because gay people have received some modest legal protections, laws that classify based on sexual orientation do not warrant heightened scrutiny. *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.

To the contrary, when the Supreme Court first began discussing heightened-scrutiny factors, women already had achieved important legislative protection from discrimination. *See Kerrigan*, 957 A.2d at 441-44. 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. As the Supreme Court recognized, the need for such laws demonstrates the seriousness and extent of the problem and the need for heightened vigilance in scrutinizing laws that classify based on sex.

The limited protections currently provided to lesbian, gay, and bisexual people do not match the legislative protections available to women at the time the courts first applied heightened scrutiny to classifications based on sex. 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 2009, when sexual orientation was added to the federal hate crimes laws. *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 in the past few years authorized the repeal of the

military's ban on gay service members, and it did so only after two courts declared the ban unconstitutional.<sup>15</sup>

Moreover, often when gay people have secured protections in state courts and legislatures, opponents have aggressively used state ballot initiative and referendum processes to repeal those laws, to amend state constitutions, and even to recall state supreme court judges who have ruled in favor of equality for gay people. The initiative process has been used more successfully against gay people than against any other social group.<sup>16</sup> This extraordinary use of ballot measures to preempt the normal legislative process and withdraw protections from gay people vividly illustrates the continuing disadvantages that gay people face in the political arena. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (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 lesbian, gay, and bisexual people “belie[ ] a continuing antipathy or

---

<sup>15</sup> *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. Oct. 12, 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. Sept. 24, 2010).

<sup>16</sup> *See also* 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).

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 lesbian, gay, and bisexual people “are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.” *Windsor*, 699 F.3d at 184. This Court should conclude that this political vulnerability supports application of heightened scrutiny to laws that discriminate based on sexual orientation.

### CONCLUSION

The Court should hold that sexual orientation discrimination must be subjected to heightened scrutiny, and that the state constitutional provisions and statutes challenged in this appeal cannot survive this demanding standard.

DATED: December 19, 2014

Respectfully submitted,

NATIONAL CENTER FOR  
LESBIAN RIGHTS

By: /s/ Christopher F. Stoll

Shannon P. Minter  
Christopher F. Stoll  
National Center for Lesbian Rights  
1100 H Street, NW, Suite 540  
Washington, DC 20005  
Telephone: (202) 734-3545  
Facsimile: (415) 392-8442  
Email: sminter@nclrights.org  
Email: cstoll@nclrights.org

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 6,668 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

Dated: December 19, 2014

/s/ Christopher F. Stoll  
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 Sixth Circuit by using the appellate CM/ECF system on December 19, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Christopher F. Stoll

## **APPENDIX**

The **Leadership Conference on Civil and Human Rights** (“The Leadership Conference”) is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States.\* It is the nation’s oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals, and toward this end, urges the Court to hold that sexual orientation classifications should be subject to heightened scrutiny. The Leadership Conference believes that every person in the United States deserves to be free from discrimination based on race, ethnicity, gender, or sexual orientation.

**API Equality-LA** is a coalition of organizations and individuals who are committed to working in the Asian/Pacific Islander ("API") community in the greater Los Angeles area for equal marriage rights and the recognition and fair treatment of LGBT families through community education and advocacy. API Equality-LA recognizes that the long history of discrimination

against the API community, especially California's history of anti-miscegenation laws and exclusionary efforts targeted at Asian immigrants, parallels the contemporary exclusion of gays and lesbians from marriage.

**Asian Americans Advancing Justice | AAJC** (“Advancing Justice-AAJC”) is a national non-profit, non-partisan 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, Advancing Justice-AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including anti-discrimination. Advancing Justice-AAJC is committed to challenging barriers to equality for all sectors of our society and has supported same-sex marriage rights in numerous amicus briefs.

**Asian Americans Advancing Justice - Asian Law Caucus** (“Advancing Justice-ALC”) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. Recognizing that social, economic, political, and racial inequalities continue to exist in the United States, Advancing Justice-ALC is committed to the pursuit of equality and justice for all sectors of our society.

**Asian Americans Advancing Justice - Chicago** (“Advancing Justice-Chicago”) is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. Advancing Justice—Chicago’s programs include community organizing, leadership development, and legal advocacy. Founded in 1992, Advancing Justice—Chicago is deeply concerned about the discrimination and exclusion faced by Asian Americans, including lesbian, gay, bisexual, transgender and queer members of the Asian American community. Accordingly, Advancing Justice—Chicago is committed to challenging barriers to equality for all members of society and has supported same-sex marriage rights in other amicus briefs.

**Asian Americans Advancing Justice | Los Angeles** (“Advancing Justice-LA”) is the nation’s largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (NHPI). As part of its mission to advance civil rights, Advancing Justice-LA is committed to challenging discrimination and has championed equal rights for the LGBT community, including supporting marriage equality for same-sex couples and opposing California's Proposition 8.

**Human Rights Campaign** (“HRC”), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender 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.

The **League of United Latin American Citizens** (“LULAC”) is the nation’s largest and oldest civil rights volunteer-based organization that empowers Hispanic Americans and builds strong Latino communities. Headquartered in Washington, DC, with 900 councils around the United States and Puerto Rico, LULAC’s programs, services and advocacy address the most important issues for Latinos, meeting critical needs of today and the future. The mission of the League of United Latin American Citizens is to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States. LULAC has a longstanding history of advancing equal justice under law for all Latinos—including our lesbian, gay, bisexual and transgender (“LGBT”) sisters and brothers. Through direct action and national resolutions, LULAC and its membership have stood firm on the right for LGBT Americans to be protected from hate crimes, the right to work free from discrimination, the right to serve openly and honestly in the U.S. Armed Services, the right to allow bi-national couples to stay together by updating antiquated immigration laws, and officially oppose federal marriage laws that discriminate against couples who have entered legal unions in their state.

**Marriage Equality USA** is a national, not-for profit, volunteer-based organization, comprised of over 40,000 same-sex couples, lesbian, gay, bisexual, and transgender people, their families, friends, supporters, and allies. The organization leads nonpartisan, community-based educational efforts to secure the freedom to marry for all loving, committed couples without regard to sexual orientation or gender identity and to have those marriages fully recognized by the federal government.

The **National Black Justice Coalition** (“NBJC”) is a civil rights organization dedicated to empowering Black lesbian, gay, bisexual and transgender (“LGBT”) people. NBJC’s mission is to end racism and homophobia. As America’s leading national Black LGBT civil rights organization focused on federal public policy, NBJC has accepted the charge to lead Black families in strengthening the bonds and bridging the gaps between the movements for racial justice and LGBT equality.

The **National Center for Lesbian Rights** (“NCLR”) is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender 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.

The **National LGBT Bar Association** (“LGBT Bar”) is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students and affiliated lesbian, gay, bisexual and transgender legal organizations. The LGBT Bar promotes justice in and through the legal profession for the LGBT community in all its diversity. This case stands to impact our membership both professionally and personally. A ruling in favor of marriage equality would greatly increase our attorneys’ ability to safeguard the families and relationships they have formed in their own lives. We believe that marriage equality is a profound step in the right direction towards equitable treatment under the law for all citizens.

The **National LGBTQ Task Force** (the “Task Force”), founded in 1973, is the oldest national LGBT civil rights and advocacy organization. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal participation of same-sex couples in the institution of civil marriage.

\*The participating members of the Leadership Conference on Civil and Human Rights include:

A. Philip Randolph Institute

AARP

Advancement Project

African Methodist Episcopal Church

Alaska Federation of Natives

Alliance for Retired Americans

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American-Arab Anti-Discrimination Committee

American Association for Affirmative Action

American Association of College for Teacher Education

American Association of People with Disabilities

AAUW

American Baptist Churches, U.S.A.-National Ministries

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federation of Government Employees

American Federation of Labor-Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

American Friends Service Committee

American Islamic Congress (AIC)

American Jewish Committee

American Nurses Association

American Postal Workers Union, AFL-CIO

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Americans United for Separation of Church and State

Amnesty International USA

Anti-Defamation League

Appleseed

Asian Americans Advancing Justice | AAJC

Asian Pacific American Labor Alliance

Association for Education and Rehabilitation of the Blind and Visually Impaired

B'nai B'rith International

Bend the Arc

Brennan Center for Justice at New York University School of Law

Building & Construction Trades Department, AFL-CIO

Center for Community Change

Center for Responsible Lending

Center for Social Inclusion

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Church Women United

Coalition of Black Trade Unionists

Coalition on Human Needs

Common Cause

Communications Workers of America

Community Action Partnership

Community Transportation Association of America

Compassion & Choices

DC Vote

Delta Sigma Theta Sorority

DEMOS: A Network for Ideas & Action

Disability Rights Education and Defense Fund

Disability Rights Legal Center

Division of Homeland Ministries-Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Episcopal Church-Public Affairs Office

Equal Justice Society

Evangelical Lutheran Church in America

FairVote: The Center for Voting and Democracy

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

Gay, Lesbian and Straight Education Network (GLSEN)

General Board of Church & Society of the United Methodist Church

Global Rights: Partners for Justice

GMP International Union

Hip Hop Caucus

Human Rights Campaign

Human Rights First

Immigration Equality

Improved Benevolent & Protective Order of Elks of the World

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union, United Automobile, Aerospace and Agricultural Implement

Workers of America (UAW)

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Council for Public Affairs

Jewish Labor Committee

Jewish Women International

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Laborers' International Union of North America

Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens

League of Women Voters of the United States

Legal Aid Society – Employment Law Center

Legal Momentum

Mashantucket Pequot Tribal Nation

Matthew Shepard Foundation

Mexican American Legal Defense and Educational Fund

Muslim Advocates

Na' Amat USA

NAACP

NAACP Legal Defense and Educational Fund, Inc.

NALEO Educational Fund

National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education

National Association of Colored Women's Clubs, Inc.

National Association of Community Health Centers

National Association of Consumer Advocates (NACA)

National Association of Human Rights Workers

National Association of Negro Business & Professional Women's Clubs, Inc.

National Association of Neighborhoods

National Association of Social Workers

9 to 5 National Association of Working Women

National Bar Association

National Black Caucus of State Legislators

National Black Justice Coalition

National CAPACD – National Coalition For Asian Pacific American Community  
Development

National Center for Lesbian Rights

National Center for Transgender Equality

National Center on Time & Learning

National Coalition for the Homeless

National Coalition on Black Civic Participation

National Coalition to Abolish the Death Penalty

National Committee on Pay Equity

National Committee to Preserve Social Security & Medicare

National Community Reinvestment Coalition

National Conference of Black Mayors, Inc.

National Congress for Puerto Rican Rights

National Congress of American Indians

National Consumer Law Center

National Council of Churches of Christ in the U.S.

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Disability Rights Network

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Filipino American Associations

National Gay & Lesbian Task Force

National Health Law Program

National Hispanic Media Coalition

National Immigration Forum

National Immigration Law Center

National Korean American Service and Education Consortium, Inc. (NAKASEC)

National Latina Institute for Reproductive Health

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Organization for Women

National Partnership for Women & Families

National Senior Citizens Law Center

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

National Women's Political Caucus

Native American Rights Fund

Newspaper Guild

OCA

Office of Communications of the United Church of Christ, Inc.

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

ORT America

Outserve-SLDN

Paralyzed Veterans of America

Parents, Families, Friends of Lesbians and Gays

People for the American Way

Phi Beta Sigma Fraternity, Inc.

Planned Parenthood Federation of America, Inc.

PolicyLink

Poverty & Race Research Action Council (PRRAC)

Presbyterian Church (USA)

Pride at Work

Prison Policy Initiative

Progressive National Baptist Convention

Project Vote

Public Advocates

Religious Action Center of Reform Judaism

Retail Wholesale & Department Store Union, AFL-CIO

SAALT (South Asian Americans Leading Together)

Secular Coalition for America

Service Employees International Union

Outserve-SLDN

Sierra Club

Sigma Gamma Rho Sorority, Inc.

Sikh American Legal Defense and Education Fund

Sikh Coalition

Southeast Asia Resource Action Center (SEARAC)

Southern Christian Leadership Conference

Southern Poverty Law Center

TASH

Teach For America

The Andrew Goodman Foundation

The Arc

The Association of Junior Leagues International, Inc.

The Association of University Centers on Disabilities

The National Conference for Community and Justice

The National PTA

The Voter Participation Center

TransAfrica Forum

Transportation Learning Center

Union for Reform Judaism

Unitarian Universalist Association

UNITE HERE!

United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries

United Farm Workers of America (UFW)

United Food and Commercial Workers International Union

United Mine Workers of America

United States International Council on Disabilities

United States Students Association

United Steelworkers of America

United Synagogue of Conservative Judaism

Wider Opportunities for Women

Workers Defense League

Workmen's Circle

YMCA of the USA, National Board

YWCA USA

Zeta Phi Beta Sorority, Inc.