UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN CARDONA,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
ERIC K. SHINSEKI,	)	Vet. App. No. 11-3083
	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

BRIEF OF *AMICI CURIAE* 15 PUBLIC-INTEREST ORGANIZATIONS AND LEGAL SERVICE ORGANIZATIONS IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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

NO. 11-3083

This brief is filed on behalf of the following organizations:

American Civil Liberties Union

Asian American Justice Center

The Asian Pacific American Legal Center

Equality Federation

Equal Justice Society

Gay and Lesbian Advocates and Defenders

Human Rights Campaign

Human Rights Campaign Foundation

Lambda Legal Defense and Education Fund, Inc.

Legal Momentum

National Black Justice Coalition

National Center for Lesbian Rights

National Gay and Lesbian Task Force

National Women's Law Center

Southern Poverty Law Center

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INTEREST OF *AMICI CURIAE*

Amici are a coalition of public-interest and legal-service organizations committed to protecting the equal rights of African-Americans, Asian Americans and Pacific Islanders, women, people who are lesbian, gay, bisexual, or transgender, and others. *Amici* submit this brief in support of the Appellant 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, and have authority to do so pursuant to this Court's grant of *amici*'s Motion for Leave to File.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU has worked for 75 years to oppose discrimination on the basis of sexual orientation and to protect the basic civil rights and liberties of lesbian, gay, bisexual, and transgender people.

The Asian American Justice Center ("AAJC"), member of the Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization in Washington, DC, 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 antidiscrimination, and is committed to challenging barriers to equality based on sexual orientation.

The 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 and Pacific Islander communities. As part of its mission to advance civil rights, APALC has championed the equal rights of the LGBT community, including supporting the freedom to marry and opposing Proposition 8.

Equality 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.

The 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-prong 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.

Gay and Lesbian Advocates and Defenders (GLAD) is New England's leading legal rights organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. In addition to GLAD's litigation on workplace discrimination, parenting issues, access to health care, public

accommodations and services, and myriad other issues in law, GLAD is litigating two separate, pending challenges to the federal Defense of Marriage Act: *Gill, et al. v. Office of Personal Management, et al.*, Nos. 10-2204, 10-2207, and 10-2214 (1st Cir. argued April 4, 2012), and *Pedersen, et al. v. Office of Personal Management, et al.*, No. 3 10 CV 1750 VLB (D. Conn. filed November 9, 2010) . GLAD has also successfully sought marriage equality in several states, most notably as counsel in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); and *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407 (Conn. 2008). GLAD has also appeared as amicus in other marriage-related litigation throughout the United States.

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.

Human Rights Campaign Foundation ("HRC Foundation") is an affiliated organization of the Human Rights Campaign. HRC Foundation's cutting edge programs develop innovative educational resources on the many issues facing lesbian, gay, bisexual and transgender individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work. Lambda Legal was counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), and has an interest in ensuring that laws that discriminate on the basis of sexual orientation receive the heightened scrutiny that equal protection demands.

Legal Momentum is the nation's oldest legal defense and education fund dedicated to advancing the rights of all women and girls. For more than 40 years, Legal Momentum has made historic contributions through litigation and public policy advocacy to advance economic and personal security for women.

The National Black Justice Coalition ("NBJC") is a civil rights organization dedicated to empowering Black LGBT people, and its mission is to eradicate racism and homophobia. As America's leading national Black LGBT civil rights organization focused on federal public policy, NBJC envisions a world where all people are fully-empowered to participate safely, openly and honestly in family, faith and community, regardless of race, sexual orientation or gender expression.

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.

National Gay and Lesbian 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 National Women's Law Center ("NWLC") is a non-profit legal organization that has worked since 1972 to advance and protect women's legal rights. The NWLC focuses on major areas of importance to women and their families, including income security, employment, education, and reproductive rights and health, with special attention to the needs of low-income families. The NWLC has participated as counsel or amicus curiae in countless cases before the Supreme Court and the federal courts of appeals to secure the equal treatment of women under the law. Whether the Constitution provides fewer protections for women who are married to women than for women who married to men is a question of significant importance to NWLC.

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. From *Hoffburg v. Alexander*, an early case challenging the military's anti-gay policy, and *Frontiero v. Richardson*, the landmark case challenging the military's refusal to grant equal benefits to married servicewomen, SPLC's work to secure the rights of disadvantaged members of the United States Armed Forces has spanned decades. Currently, the SPLC is engaged in *Tracey Cooper-Harris et al. v. United States of America et al.*, a case challenging the denial of spousal benefits to veterans in same-sex marriages.

SUMMARY OF THE ARGUMENT

The Court should 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 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, e.g.*, Letter from the Attorney Gen. to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.[1]

The protection of heightened scrutiny for sexual orientation classifications is long overdue. For 25 years, the Supreme Court's erroneous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), effectively distorted federal equal protection case law and prevented gay people[2] from receiving the protection against unjustified unequal treatment

[1] The Executive Branch has taken this position in cases across the country challenging the constitutionality of the so-called Defense of Marriage Act ("DOMA"). *See, e.g.*, *Gill v. Office of Pers. Mgmt.*, Nos. 10-2204, 10-2207, and 10-2214 (1st Cir. argued April 4, 2012); *Pederson v. Office of Pers. Mgmt.*, No. 3 10 CV 1750 (VLB) (D. Conn.); *Windsor v. United States*, 10 civ. 8435 (BSJ) (S.D.N.Y.); *Golinski v. U.S. Office of Pers. Mgmt.*, No. C 10–00257 JSW, 2012 WL 569685 (N.D. Cal. Feb. 22, 2012).

[2] 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.

that heightened scrutiny provides. During this time period, the Federal Circuit in *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), 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. *Id.* at 1076.

Now that *Bowers* has been overruled by *Lawrence v. Texas*, 539 U.S. 558, 575-78 (2003), this Court must determine whether heightened scrutiny is appropriate by following traditional equal protection analysis instead of relying on *Woodward* and other discredited precedents that rest on *Bowers*. This 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, Tex. 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; *see also SKF USA, Inc. v. U.S. Customs & Border Protection*, 556 F.3d 1337, 1360 (Fed. Cir. 2009).

Certain classifications, however, carry a particularly high risk of being employed illegitimately and are therefore treated as "suspect" or "quasi-suspect." *Briggs v. Merit Systems Protection Bd.*, 331 F.3d 1307, 1317 (Fed. Cir. 2003); *cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). In a long line of cases, the Supreme Court has 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* Superseding Brief for the United States Department of Health and Human Services, *et. al.* ("*Gill* HHS Brief") at 22, *Gill v. Office of Personnel Management*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. argued April 4, 2012); Defendant United States' Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment and Intervenor's Motion to Dismiss ("DOJ *Windsor*

Memorandum") at 5-6, *Windsor v. United States*, No. 10-CV-8435, 2011 WL 3754396 (S.D.N.Y. Aug. 19, 2011); *see also infra* at Section III.A (explaining the relative importance of the heightened-scrutiny factors).

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 by 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 the 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); *Briggs*, 331 F.3d at 1317; *Berkley v. United States*, 287 F.3d 1076, 1082 & n.1 (Fed. Cir. 2002).

> 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 either form 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); *Berkley*, 287 F.3d at 1082 & n.1.

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. There Is No Controlling Authority In The Federal Circuit About Whether Sexual Orientation Classifications Meet The Traditional Factors For Applying Heightened Scrutiny.

A. *Woodward* And Other Federal Decisions Before *Lawrence* Rejected Heightened Scrutiny By Relying On The Discredited Logic Of *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; *see also Gill* HHS Brief at 29; DOJ *Windsor* Memorandum at 7-8. 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.

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.[3] 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.[4]

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[3] *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).

[4] *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*,

The Federal Circuit's decision in *Woodward* followed the prevailing view that *Bowers* automatically foreclosed sexual orientation classifications from receiving heightened scrutiny. The *Woodward* court succinctly reasoned:

> After [*Bowers*] it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm. We agree with the court in *Padula v. Webster* that 'there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.' 822 F.2d 97, 103 (D.C. Cir. 1987).

Woodward, 871 F.2d at 1076. Instead of examining all of the heightened scrutiny factors, the *Woodward* court focused solely on the issue of immutability, and assumed that the only characteristic uniting gay people as a class was their propensity to engage in intimate activity that, at the time, could be criminalized. *Id*.

By contrast, the few lower courts that actually applied 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*.[5] Judges Norris and Canby on the Ninth Circuit

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895 F.2d 563, 571 (9th Cir. 1990); *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).

[5] *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); *BenShalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis. 1989), *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 v. 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),

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*, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc). But the majority of their colleagues on the Ninth Circuit viewed *Bowers* as an absolute barrier to heightened scrutiny. *See High Tech Gays*, 895 F.2d at 571 (holding that *Bowers* precluded sexual orientation from being recognized as a suspect classification); *High Tech Gays*, 909 F.2d at 376 (declining to hear *High Tech Gays* en banc).

B. By Overruling The *Bowers* Decision, *Lawrence* Fatally Undermined *Woodward*'s Conclusion That Sexual Orientation Discrimination Is Not Subject To Heightened Scrutiny.

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 [*Woodward*] no longer withstands scrutiny." *Gill* HHS Brief at 27; *see also* DOJ *Windsor* Memorandum at 7. Now that *Lawrence* has overruled *Bowers*, *Woodward* no longer controls the heightened-scrutiny analysis, and this Court should resume the proper heightened-scrutiny analysis that *Bowers* cut short.

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rev'd 155 F.3d 628 (2d Cir. 1998) (based on concession from counsel that plaintiffs intended to rely only on rational-basis review).

Woodward held that since sexual orientation is "primarily behavioral," discrimination based on sexual orientation cannot be "constitutionally infirm." *Woodward*, 871 F.2d at 1076. In overruling *Bowers*, the Court in *Lawrence* rejected this attempt to distinguish discrimination based on "homosexual conduct" 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 Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law 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*.[6]

[6] *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"); *Golinski*, 2012 WL 569685, *10 (N.D. Cal. Feb. 22, 2012).

To be sure, even after *Lawrence* some circuit courts have held that sexual orientation discrimination is not subject to heightened scrutiny. But those decisions simply followed outdated cases that relied on *Bowers* instead of engaging in a proper analysis of the heightened-scrutiny factors.[7] In several cases the parties had not submitted briefs on the appropriate standard of scrutiny or otherwise presented the issue to the court.[8] 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 reverted to a wholly different question: whether "'individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the

[7] *See, e.g.*, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (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. 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).

[8] *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*).

authority to implement.'" *Id.* at 866-67 (quoting *Cleburne*, 473 U.S. at 441). The court then 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 id.* at 867-68. The *Bruning* court thus 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.

Amici agree with the Executive Branch that the "responsible procreation" theory is not a rational basis for disparate treatment of gay people. *See* DOJ *Windsor* Memorandum at 25-27. More importantly here, the *Bruning* panel appears to have mistakenly concluded that if a classification sometimes can be "rational," then that classification never should be subjected to heightened scrutiny. That was a serious logical error. If suspect classifications always failed rational-basis review, then there would be no need for heightened 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. Ala. 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 short – as the Executive Branch recognizes – no circuit court after *Lawrence* has properly addressed whether sexual orientation should be afforded heightened scrutiny under the traditional heightened-scrutiny test. Therefore, 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. *See, e.g.*, *Golinski*, 2012 WL 569685, *11-*14 (N.D. Cal. Feb. 22, 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426-62 (Conn. 2008) (analyzing federal precedent when interpreting 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 Or Contribute To Society.

As explained above, when determining whether a classification should be subjected to heightened scrutiny the Supreme Court has examined two essential factors: (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 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 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 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 other courts and by the government. *See Golinski*, 2012 WL 569685 at *11; *Perry*, 704 F.Supp.2d at 981-91; *Gill* HHS Brief at 28-38; DOJ *Windsor* Memorandum at 7-15.

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.[9] Although 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*, 2012 WL 569685 at *12; *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). Empirical evidence and scientifically rigorous studies have consistently found that gay people are as able as heterosexuals to raise children and to form loving, committed relationships. *See Perry*, 704. F. Supp. 2d at 967-68; *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 & n.106 (D. Mass. 2010); *accord Gill* HHS Brief at 50-51; DOJ *Windsor* Memorandum at 20-21. Thus, a person's sexual orientation is not generally relevant to any legitimate policy objective of the government. *Golinski*, 2012 WL 569685 at *12; *Gill* HHS Brief at 45; DOJ *Windsor* Memorandum at 20-21.

[9] *See, e.g.*, *Watkins*, 875 F.2d at 725 (Norris, J., concurring in the judgment); *Perry*, 704 F. Supp. 2d at 1002; *Equality Found.*, 860 F. Supp. at 437; *Varnum*, 763 N.W.2d at 890; *Kerrigan*, 957 A.2d at 435; *Dean v. District of Columbia*, 653 A.2d 307, 345 (D.C. 1995).

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.[10] 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 not, or to what degree, it is biologically determined. S*ee, e.g.*, *High Tech Gays*, 909 F.2d at 377 (Canby, J., dissenting); *Golinski*, 2012 WL 569685 at *12; *Able*, 968 F. Supp. at 863-64; *Equality Found.*, 860 F. Supp. at 426; *Jantz*, 759 F. Supp. at 1548.[11]

"[T]he consensus in the scientific community is that sexual orientation is an immutable characteristic." *Golinski*, 2012 WL 569685 at *12 (citing G.M. Herek, et al. *Demographic, Psychological, and Social Characteristics of Self–Identified Lesbian, Gay,*

[10] 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).

[11] As discussed above, *Woodward*'s faulty discussion of immutability is no longer good law after *Lawrence* and *CLS*, which 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.

and Bisexual Adults, 7, 176–200 (2010)); *Perry*, 704 F. Supp. 2d at 966); *see also Gill* HHS Brief at 39 ("[T]he overwhelming consensus in the scientific community [is] that sexual orientation is an immutable characteristic." (citations omitted); DOJ *Windsor* Memorandum at 16 (same). 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 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, straight or bisexual, 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. Mass. Bd. Of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976) (explaining that the risk of invidious discrimination based on age is lessened by the 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 by some, but is instead 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.*, *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"); *Golinksi*, 2012 WL 569685 at *12 ("[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.").[12]

In light of the overwhelming scientific evidence of the immutability of sexual orientation, this Court should conclude that sexual orientation is an immutable characteristic. Gay people should not be forced to sacrifice their sexual orientation in order to avoid discriminatory treatment. *Lawrence*, 539 U.S. at 574; *In re Marriage*

[12] *See also Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (concluding that sexual orientation is "immutable" for purposes of determining whether gay people are a "social group" eligible for asylum), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

Cases, 183 P.3d at 442; *Watkins*, 875 F.2d at 725-26 (Norris, J., concurring in the judgment).

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 Golinski*, 2012 WL 569685 at *13-14; *Perry*, 704 F.Supp.2d at 943-44, 987-88; *Kerrigan*, 957 A.2d at 444-47 & 452-54; *Gill* HHS Brief at 36-37 & 41-43; DOJ *Windsor* Memorandum at 18-20.

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 Supreme Court never has 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 and racial minorities already had far more legislative protection from discrimination than gay people have today. *See Kerrigan*, 957 A.2d at 441-44; DOJ

Windsor Memorandum at 19-20. By the early 1970s, African-Americans already were "protected by three federal constitutional amendments, major federal Civil Rights Acts of 1866, 1870, 1871, 1875 (ill-fated though it was), 1957, 1960, 1964, 1965, and 1968, as well as by antidiscrimination laws in 48 of the states." *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting). Likewise, 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 race and gender, 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 race and sex must be subjected to heightened scrutiny.

The limited protections currently provided to gay people do not approach the legislative protections of the rights of African-Americans or women at the time classifications based on race and sex were deemed suspect by the courts. There is no federal legislation expressly prohibiting discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing. And no federal legislation ever had 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. 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 lesbian and gay service members, and it did so only after two courts declared the ban unconstitutional.[13] Even the small steps that the Obama administration has taken to ameliorate discrimination in the benefits paid to lesbian and gay federal employees have been stymied by interpretations of the discriminatory Defense of Marriage Act.[14]

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 gays and lesbians than against any other social group.[15] 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. Carolene Prods.*, 304 U.S.

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[13] *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).

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

[15] *See also* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997) (calculating the 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).

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 short, 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.[16]

CONCLUSION

The Court should provide gay people with the critical protections to which they are entitled under a proper equal protection analysis and hold that sexual orientation discrimination must be subjected to heightened scrutiny.

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[16] Some advocates have cited to Justice Scalia's dissent in *Romer*, which asserted that "because those who engage in homosexual conduct tend to . . . have high disposable income . . . they possess political power much greater than their numbers, both locally and statewide." *Romer*, 517 U.S. at 645-46 (Scalia, J., dissenting). That stereotype is contradicted by empirical economic evidence. The myth that gay people are generally more urban and affluent is drawn from marketing studies aimed at wealthy potential customers; to the extent that reliable economic data exists, the data shows that gay people tend on average to earn *less* than their heterosexual counterparts. *See* M.V. Lee Badgett, *Money, Myths, and Change: The Economic Lives of Lesbians & Gay Men* 24-26, 45-46 (2001); *Andersen v. King Cnty.*, 138 P.3d 963, 1031 (Wash. 2006) (Bridge, J., dissenting).

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that the foregoing Brief of *Amici Curiae* 15 Public-Interest Organizations and Legal Service Organizations In Support of Appellant was filed via email, upon the instructions of court staff, on this 26th day of April, 2012. Once docketed, notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

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