Nos. 12-15388, 12-15409

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT et al.,
Defendants-Appellants,

and

BIPARTISAN LEGAL ADVISORY GROUPS OF THE U.S. HOUSE OF REPRESENTATIVES
Defendant-Intervenor-Appellant.

On Appeal from United States District Court for the Northern District of California
Case No. 10-CV-00257 (Honorable Jeffrey S. White)

BRIEF OF *AMICI CURIAE* 29 PUBLIC-INTEREST AND LEGAL SERVICE ORGANIZATIONS IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

Elizabeth O. Gill
Alan L. Schlosser
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm St.
San Francisco, CA 94111
(415) 621-2493

Mary L. Bonauto
Gary D. Buseck
GAY & LESBIAN ADVOCATES & DEFENDERS
30 Winter Street, #800
Boston, MA 02108
(617) 426-1350

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

This brief is filed on behalf of the following organizations:

American Civil Liberties Union Foundation of Northern California

API Equality – Los Angeles

API Equality – Northern California

Asian American Institute

Asian American Justice Center

Asian Law Caucus

Asian Pacific American Legal Center

Chinese for Affirmative Action

Equal Justice Society

Equality California

Equality Federation

Freedom to Marry

Gay & Lesbian Advocates & Defenders

Hispanic National Bar Association

Human Rights Campaign

Impact Fund

Japanese American Citizens League

Jewish Alliance for Law and Social Action

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Legal Aid Society–Employment Law Center

Mexican American Legal Defense and Educational Fund

National Asian Pacific American Bar Association

National Center for Lesbian Rights

National LGBT Bar Association

National Organization for Women Foundation

National Women's Law Center

Out & Equal Workplace Advocates

Southern Poverty Law Center

Transgender Law Center

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

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

TABLE OF CONTENTS

Page

INTERESTS OF *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

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." 4

II. No Circuit Court After *Lawrence* Has Analyzed Whether Sexual Orientation Classifications Meet The Traditional Factors For Applying Heightened Scrutiny. 8

A. Federal Decisions Before *Lawrence* Rejected Heightened Scrutiny By Relying On *Bowers*. 8

B. By Overruling The *Bowers* Decision, *Lawrence* Fatally Undermined *High Tech Gays*' Conclusion That Sexual Orientation Discrimination Is Not Subject To Heightened Scrutiny. 12

III. Under The Traditional Heightened-Scrutiny Test, Classifications Based On Sexual Orientation Must Be Recognized As Suspect Or Quasi-Suspect. 16

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. 16

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. 17

C. Sexual Orientation Is Sufficiently "Immutable" To Warrant Heightened Scrutiny. 18

D. Gay People Are Uniquely Disadvantaged In The Political Arena. 21

IV. This Court Should Invalidate DOMA By Applying Heightened Scrutiny, Not Rational-Basis Review. 25

CONCLUSION 27

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Able v. United States, 968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd* 155 F.3d 628 (2d Cir. 1998).....11, 19

BenShalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989), *rev'd* 881 F.2d 454 (7th Cir. 1989).....11

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989).....9, 22

Bowers v. Hardwick, 478 U.S. 186 (1986).....passim

Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).....13, 19

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006).....14

City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).....passim

City of New Orleans v. Dukes, 427 U.S. 297 (1976).....6

Clark v. Jeter, 486 U.S. 456 (1988).....6

Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (Scalia, J., concurring).....5

Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995).....17

Equality Found. of Greater Cincinnati v. Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995).....11, 17, 19

Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995).....9

Frontiero v. Richardson, 411 U.S. 677 (1973).....22, 23

G.M. Herek, et al. *Demographic, Psychological, and Social Characteristics of Self–Identified Lesbian, Gay, and Bisexual Adults* (2010) 19

Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 & n.106 (D. Mass. 2010) 18

Gill v. Office of Pers. Mgmt., Nos. 10-2204, 10-2207, and 10-2214 (1st Cir. argued April 4, 2012) 2

Golinski v. Office of Personnel Management, 824 F. Supp. 2d 968, 989 (N.D.Cal. 2012) 2, 5

Grutter v. Bollinger, 539 U.S. 306 (2003).....7

Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000) 21

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) 11

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

High Tech Gays, 909 F.2d 375 (9th Cir. 1990) 11, 19

Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (1997); 27

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) 15, 16, 21

J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127 (1994).....15

Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992).....11, 19

Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004).....14

Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005) 13

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

Lawrence v. Texas, 539 U.S. 558, 575-78 (2003) .....passim

Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) 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) 23

Marbury v. Madison, 1 Cranch 137 (1803) 6, 26

Mass. Bd. Of Ret. v. Murgia, 427 U.S. 307 (1976).....20

Massachusetts v. U.S. Dep't of Health & Human Servs., _ F.3d _, 2012 WL 1948017 (1st Cir. May 31, 2012) 1

Mathews v. Lucas, 427 U.S. 495 (1976).....20

Nyquist v. Mauclet, 432 U.S. 1 (1977).....18

Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) 9

Pederson v. Office of Pers. Mgmt., No. 3 10 CV 1750 (VLB) (D. Conn.) 2

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

Plyler v. Doe, 457 U.S. 202 (1982).....5, 20

Price-Cornelison v. Brooks, 524 F.3d 1103 (10th Cir. 2008) 13, 14

Richenberg v. Perry, 97 F.3d. 256 (8th Cir. 1996).....9, 27

Romer v. Evans, 517 U.S. 620 (1996) 6, 7

Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) 9

Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250 (6th Cir. 2006) 13

Taylor v. Louisiana, 419 U.S. 522 (1975) 15

Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005).....21

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

United States v. Carolene Prods. Co., 304 U.S. 144 (1938) 4, 6, 24

United States v. Richardson, 418 U.S. 166 (1974) (Powell, J., concurring) 6

United States v. Virginia, 518 U.S. 515 (1996) 7

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....15, 16, 17, 26

Veney v. Wyche, 293 F.3d 726, 732 (4th Cir. 2002) 27

Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (en banc) (Norris, J., concurring).....11, 17, 21

Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y 2012) 2

Witt v. U.S. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008).....13, 14

Witt v. U.S. Dep't of Air Force, 739 F. Supp. 2d 1308 (W.D. Wash. Sept. 24, 2010) 23

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) 9, 12

STATUTES

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2190 (2009).....23

OTHER AUTHORITIES

Am. Psychiatric Ass'n , *Resolution*, (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974) 18

Arthur S. Leonard, *Exorcizing the Ghosts of* Bowers v. Hardwick*: Uprooting Invalid Precedents*, 84 Chi.-Kent L. Rev. 519 (2009).....13

Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies re Federal Benefits and Non-Discrimination* (June 17, 2009), *available at* http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri.....23

Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997).....24

Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 17 (1996).....25

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).....24

Federalist 78 (Hamilton) (G. Carey & J. McClellan eds. 2001).....6

John Hart Ely, *Democracy & Distrust* (1980).....9, 19

Laurence H. Tribe, *American Constitutional Law* (2d ed.) (1988).....9

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.....2

Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. Cal. Rev. L. & Soc'l J. 209, 231 n.51 (2009).....25

Minutes of the Annual Meeting of the Council of Representatives, 30 Am. Psychologist 620 (1975).....18

The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285 (1985).....9

INTEREST OF *AMICI CURIAE*[1]

Amici are a coalition of 29 public-interest and legal-service organizations and advocacy groups committed to protecting the equal rights of all women and minorities in the United States, including African-Americans, Latinos, Asian Americans and Pacific Islanders, women, and lesbian, gay, bisexual, and transgender individuals.[2] *Amici* submit this brief in support of Appellee 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.

---

[1] The parties have consented to the filing of this brief. Counsel for the parties have not authored this brief. Lambda Legal, counsel for Appellee, joined a similar brief in *Massachusetts v. U.S. Dep't of Health & Human Servs.*, __ F.3d __, 2012 WL 1948017 (1st Cir. May 31, 2012), which was primarily authored by the ACLU. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the 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.

[2] A brief description of each *amicus* is included herein as Appendix A.

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* Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011)[3]; *see also Golinski v. Office of Personnel Management*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012).

The protection of heightened scrutiny for sexual orientation classifications is long overdue. The Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186

---

[3] *Available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The Executive Branch has taken this position in cases across the country challenging the constitutionality of the so-called Defense of Marriage Act ("DOMA"), including this case. *See* Brief for the Office of Personnel Management, *et. al.* ("OPM Brief"); *see also* briefs filed by the Executive Branch in *Massachusetts*, __ F.3d __ , 2012 WL 1948017 ; *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y 2012), and *Pederson v. Office of Pers. Mgmt.*, No. 3 10 CV 1750 (VLB) (D. Conn).

(1986) effectively precluded the courts from extending to gay people[4] the protection against unjustified unequal treatment that heightened scrutiny provides. In *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), the Ninth Circuit, like other circuits, read *Bowers* as categorically foreclosing gay people from being treated as a suspect or quasi-suspect class, even if they would have received such protections under the traditional equal protection analysis. *Id.* at 571.

Now that *Bowers* has been overruled by *Lawrence v. Texas*, 539 U.S. 558, 575-78 (2003), any impediment to a determination of whether heightened scrutiny is appropriate for sexual orientation classifications following traditional equal protection analysis has been removed. Although *amici* agree with the plaintiffs that DOMA fails to survive even rational-basis review, invalidating DOMA under rational-basis review would leave the proper standard of scrutiny unresolved and leave gay people in this circuit vulnerable to continued discrimination that purportedly clears the threshold of rationality. 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.

---

[4] 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.

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.

Certain classifications, however, carry a particularly high risk of being employed illegitimately and are therefore treated as "suspect" or "quasi-suspect." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). In a long line of cases, the Supreme Court developed a framework for determining whether a classification should be treated with suspicion and subjected to heightened scrutiny. The essential factors in this framework are (1) whether a classified group has suffered a history of invidious discrimination, and (2) whether the classification has any bearing on a person's ability to perform in or contribute to

society. As additional—but not dispositive—factors, courts occasionally have considered whether the characteristic is immutable or an integral part of a person's identity and whether the group is a minority or lacks sufficient power to protect itself in the political process. *See* OPM Brief at 14; *accord Golinski*, 824 F. Supp. 2d at 983.

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

In our system of separation of powers, the judiciary plays a critical role in carefully reviewing such high-risk classifications under the Equal Protection Clause to ensure that "the democratic majority . . . accept[s] for themselves and their loved ones what they impose on you and me." *Cruzan 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).

> Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship – other than pure prejudicial discrimination – to the stated purpose for which the classification is being made.

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

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

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

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

From 1986 to 2003, traditional equal protection analysis for sexual orientation classifications was cut short by the Supreme Court's decision in *Bowers*, which erroneously held that the Due Process Clause does not protect "a fundamental right . . . [for] homosexuals to engage in sodomy." *Bowers*, 478 U.S. at 190. The Supreme Court overruled *Bowers* in *Lawrence*, and emphatically declared that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. But in the meantime, the *Bowers* decision had imposed a "stigma" that "demean[ed] the lives of homosexual persons" in other areas of the law as well. *Id.* at 575. As *Lawrence* explained, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination." 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.[5] 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.[6] For example, in its first sexual orientation equal protection decision to consider the issue after *Bowers*, the D.C. Circuit reasoned:

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

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

---

[5] *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).

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

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

The Ninth Circuit's decision in *High Tech Gays* followed the prevailing view that *Bowers* automatically foreclosed sexual orientation classifications from receiving heightened scrutiny. The *High Tech Gays* court reasoned:

> [I]f there is no fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment, it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment.

High Tech Gays, 895 F.2d at 571 (internal citation omitted).[7] Because it relied on *Bowers*, the *High Tech Gays* court did not engage in a full analysis of the heightened scrutiny factors; though it recognized that "homosexuals have suffered a history of discrimination," it then only summarily addressed two of the other factors, immutability and political powerlessness. *Id*. at 573-74.

By contrast, the few lower courts that actually engaged in an analysis of the heightened-scrutiny factors concluded that sexual orientation must be treated as a

---

[7] Because *High Tech Gays* involved a challenge to a Department of Defense policy, the Fifth as opposed to the Fourteenth Amendment equal protection clause applied. As that court recognized, however, the Ninth Circuit's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *High Tech Gays*, 895 F.2d at 570-71.

suspect or quasi-suspect classification. But those decisions were uniformly reversed or superseded by Court of Appeals decisions relying on *Bowers*.[8] Judges Norris and Canby of this Court 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 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).

---

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

B. By Overruling The *Bowers* Decision, *Lawrence* Fatally Undermined *High Tech Gays*' 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 these circuit decisions thus no longer withstands scrutiny." OPM Brief at 15. Now that *Lawrence* has overruled *Bowers*, courts should resume the proper heightened-scrutiny analysis that *Bowers* cut short.

Further, in overruling *Bowers*, the Supreme Court in *Lawrence* rejected the logic of the *High Tech Gays* and other courts that attempted to distinguish discrimination based on "homosexual conduct" from invidious discrimination against gay people as a class. *High Tech Gays*, 895 F.2d at 573; *see also Woodward*, 871 F.2d at 1076. As *Lawrence* explained, "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." *Lawrence*, 539 U.S. at 575 (emphasis added); *accord id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual.

Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."). Indeed, applying *Lawrence*, the Court in *Christian Legal Society Chapter of the University of California, Hastings College 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*.[9]

Some circuit courts have held that sexual orientation discrimination is not subject to heightened scrutiny, even after *Lawrence*. But those decisions simply followed outdated cases that relied on *Bowers* instead of engaging in a proper analysis of the heightened-scrutiny factors.[10] In several cases the parties had not submitted briefs on the appropriate standard of scrutiny or otherwise presented the

---

[9] *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).

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

issue to the court.[11] The only post-*Lawrence* circuit court decision that does not rely on *Bowers* and its progeny is *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), which upheld a state constitutional amendment barring same-sex couples from marrying. But instead of applying the framework established by the Supreme Court to determine whether sexual orientation classifications require heightened scrutiny, the *Bruning* panel tautologically concluded that rational-basis review should apply to classifications based on sexual orientation because a rational basis allegedly existed for such classifications in some circumstances. *Bruning*, 455 F.3d. at 867-68.[12] Yet 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

---

[11] *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*).

[12] The court apparently concluded that because same-sex couples cannot procreate by accident, there exists a rational basis for distinguishing between same-sex and different-sex couples for purposes of conferring the benefits of marriage. *See Bruning*, 455 F.3d at 867-68. *Amici* agree with the Executive Branch that the "responsible procreation" theory is not a rational basis for disparate treatment of gay people. *See* OPM Brief at 42-45.

when certain classifications have historically been prone to abuse. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) ("a shred of truth" is not enough to justify the use of invidious stereotypes); *cf. Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) (discrimination against women jurors cannot be justified "on merely rational grounds") (footnote omitted).

In deciding whether heightened scrutiny applies, this Court should look for guidance to recent decisions that have carefully examined the heightened-scrutiny test and concluded that sexual orientation must be recognized as a suspect or quasi-suspect classification—including the decision of the district court. *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 985-90; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd* 671 F.3d 1052; *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*, 824 F. Supp. 2d at 985-86; *Perry*, 704 F. Supp. 2d at 981-91; OPM Brief at 20-30.

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.[13] 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

---

[13] *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).

497 (1974); *see also Golinski*, 824 F. Supp. 2d at 986; *Perry*, 704 F. Supp. 2d at 967; *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975) (reflecting a similar American Psychological Association statement).

For example, 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 (D. Mass. 2010); *accord* OPM Brief at 43-44.

In short, a person's sexual orientation is rarely, if ever, relevant to any legitimate policy objective of the government. *Golinski*, 824 F. Supp. 2d at 986; OPM Brief at 36-37.

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.[14] But even assuming that such an inquiry is relevant,

---

[14] 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

courts have recognized that sexual orientation is "immutable" for all pertinent purposes here, regardless of whether, or to what degree, it is biologically determined. S*ee, e.g.*, *High Tech Gays*, 909 F.2d at 377 (Canby, J., dissenting); *Golinski*, 824 F. Supp. 2d at 986-87; *Able*, 968 F. Supp. at 863-64; *Equality Found.*, 860 F. Supp. at 426; *Jantz*, 759 F. Supp. at 1548.[15]

"[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* OPM Brief at 31 ("[T]he overwhelming consensus in the scientific community [is] that sexual orientation is an immutable characteristic." (citations omitted). 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

---

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).

[15] As discussed above, the reliance of the *High Tech Gays* court on a distinction between status and conduct in concluding that sexual orientation is not an immutable characteristic is no longer good law after *Lawrence* and *Christian Legal Society*.

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 or straight, a person's sexual orientation is an integral component of a person's identity, and *Lawrence* made clear that gay people cannot be required to sacrifice this central part of their identity any more than heterosexual people may be required to do so. *Lawrence*, 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."). Classifications based on sexual orientation thus raise the specter that a legislative majority seeks to impose burdens on gay people that they would be unwilling to accept if applied to their own lives. *Cf. 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.*, *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"); *Golinksi*, 824 F. Supp. 2d at 987 ("[A] person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it."); *In re Marriage Cases*, 183 P.3d at 442 ("[A] person's sexual orientation is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.").

This Court should therefore conclude that sexual orientation is an immutable characteristic, and gay people should not be forced to sacrifice 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).

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*, 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; OPM Brief at 33-35.

Against the weight of this evidence, some courts have asserted that because gay people have received some modest legal protections, sexual orientation should not be treated as a suspect or quasi-suspect classification. *See High Tech Gays*, 895 F.2d at 574; *Ben-Shalom*, 881 F.2d at 466 n.9. That analysis fundamentally misconstrues the Supreme Court's equal protection precedents. The Court has never construed the concept of political powerlessness to mean that a group is unable to secure *any* protections for itself through the normal political process.

When the Supreme Court first began discussing heightened-scrutiny factors, women already had far more legislative protection from discrimination than gay people have today. *See Kerrigan*, 957 A.2d at 441-44; OPM Brief at 35. By the time the *Frontiero* plurality recognized sex as a suspect or quasi-suspect classification, Congress already had passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. *See Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality); *Kerrigan*, 957 A.2d at 451-53. These legislative protections did not eradicate invidious discrimination on the basis of sex, which continues to this day. And the existence of these protections did not stop the

Supreme Court from holding that discrimination on the basis of sex must be subjected to heightened scrutiny.

The limited protections currently provided to gay people do not approach the legislative protections of the rights women at the time classifications based on sex were deemed suspect by the courts. There is no federal legislation expressly prohibiting discrimination on the basis of sexual orientation in employment or education, as there was on the basis of sex when *Frontiero* was decided. Indeed, no federal legislation had ever been passed to protect people on the basis of their sexual orientation until sexual orientation was added to the federal hate crimes laws in 2009. *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2190, 2835-44 (2009). Congress only recently authorized the repeal of the military's ban on gay service members, and it did so only after two courts declared the ban unconstitutional.[16] Even the small steps that the Obama administration has taken to ameliorate discrimination in the benefits paid to gay federal employees have been stymied by interpretations of the discriminatory Defense of Marriage Act.[17]

---

[16] *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).

[17] *See* Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re Federal Benefits and Non-Discrimination (June 17, 2009), available at

Moreover, when gay people have secured minimal protections in state courts and legislatures, opponents have aggressively used state ballot initiative and referendum processes to repeal laws or even to amend state constitutions. The initiative process has now been used more successfully against gay people than against any other social group.[18] 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. at 153 n.4 (noting that heightened scrutiny is warranted when majority prejudice "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

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

---

http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri.

[18] *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).

traditional legislative processes to protect them from invidious discrimination. That vulnerability warrants heightened scrutiny by the courts.

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

Amici agree with the plaintiffs that DOMA fails to survive constitutional review under any level of scrutiny. *Amici* nevertheless urge the Court to decide this case by concluding that sexual orientation is a suspect or quasi-suspect classification, and subjecting DOMA to heightened scrutiny.[19]

This Court has discretion to choose among possible grounds for a decision, and it is sometimes more appropriate to decide an important issue of law than to leave the issue unresolved. Leaving important questions unresolved can impose significant burdens on future litigants and courts that do not know what legal standard will be applied to resolve disputes. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 17 (1996).

In this case, leaving the standard of scrutiny unresolved and invalidating DOMA under rational-basis review would not necessarily be the more "minimalist" approach. To the contrary, by concluding that DOMA fails

[19] This case does not implicate the doctrine of constitutional avoidance because whatever standard of scrutiny it applies, the Court will have to rest its decision on constitutional grounds. *See* Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. Cal. Rev. L. & Soc'l J. 209, 231 n.51 (2009) (distinguishing between doctrine of constitutional avoidance and "selection among constitutional arguments").

heightened scrutiny, this Court may avoid deciding the additional question of whether DOMA also fails the more deferential rational-basis test. *Cf. Varnum*, 763 N.W.2d at 899 n.26 ("[W]e do not address whether there is a rational basis for the marriage statute, as the sexual-orientation classification made by the statute is subject to a heightened standard of scrutiny."). Leaving the standard of scrutiny undecided would also waste judicial resources by forcing litigants in every case, such as the present one, to build a record supporting or opposing a law under several different potential standards of review. To preserve the argument that sexual orientation should be recognized as a suspect or quasi-suspect factor, litigants must devote time, resources, and briefing space in every case to explain why the traditional suspect classification test justifies heightened review.

With so much at stake for so many people, the Court should decide the issue in this case, where that record has been carefully established and the issue squarely presented by the plaintiffs and the district court decision. This Court should "say what the law is," and make clear that sexual orientation classifications must be subjected to heightened scrutiny. *See Marbury*, 1 Cranch at 177. A decision that leaves the appropriate standard of scrutiny unresolved will subject gay people to continued discrimination until this circuit has the opportunity to address the issue again. Indeed, leaving the standard of scrutiny undecided has in the past been misinterpreted by lower courts as an affirmative decision that rational basis—and

not heightened scrutiny—is the appropriate standard of review, which might be used to justify discrimination that purportedly clears the threshold of minimal rationality.[20] This Court should not needlessly allow such discrimination to continue. Now that *Bowers* has been firmly overruled, this Court has the opportunity to provide gay people with the critical constitutional framework of protections to which they are entitled under a proper equal protection analysis. *Amici* urge this Court to do so.

CONCLUSION

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

DATED: July 10, 2012

Respectfully submitted,

By: s/ Elizabeth O. Gill
Attorney for *Amici Curiae*

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

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,369 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 2010 in 14-point Times New Roman type style.

Dated: July 10, 2012

s/ Elizabeth O. Gill
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 Ninth Circuit by using the appellate CM/ECF system on July 10, 2012.

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/ Angela Galdamez

APPENDIX A

APPENDIX A

The **ACLU Foundation of Northern California** ("ACLU-NC") is the largest affiliate of the American Civil Liberties Union, a nationwide, nonpartisan organization with more than 550,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by state and federal Constitutions and civil rights statutes. ACLU-NC works on behalf of LGBT people to win even-handed treatment by government; protection from discrimination in jobs, schools, housing, and public accommodations; and equal rights for same-sex couples and LGBT families.

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. It 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 in the United States.

API Equality – Northern California is a coalition of Asian Pacific Islander (API) and Lesbian, Gay, Bisexual, Trans, Intersex, and Queer/Questioning (LGBTIQ) of organizations and individuals that is committed to reducing and

eliminating prejudice and oppression based on gender, gender identity, and/or sexual orientation in the diverse ethnic communities of the API populace and to reducing and eliminating racially-motivated or xenophobic prejudice and oppression in the LGBTQI community.

Asian American Institute ("AAI") is a pan-Asian, non-partisan, not-for profit organization located in Chicago, Illinois, whose mission is to empower and advocate for the Asian American community through advocacy, coalition-building, education, and research. AAI is a member of the Asian American Center for Advancing Justice, whose other members include Asian American Justice Center, Asian Law Caucus, and Asian Pacific American Legal Center. AAI's programs include community organizing, leadership development, and legal advocacy. AAI is deeply concerned about the discrimination and lack of fair representation faced by minorities and marginalized communities. Accordingly, AAI has a strong interest in this case.

The **Asian American Justice Center** ("AAJC"), member of the Asian American Center for Advancing Justice, is a national non-profit, nonpartisan organization in Washington, D.C., whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including

discrimination. AAJC is committed to challenging barriers to equality for all sectors of our society and has supported same-sex marriage rights as an amicus in other cases on this issue.

The mission of the **Asian Law Caucus** is to promote, advance, and represent the legal and civil rights of Asian and Pacific Islander communities. The Asian Law Caucus is a member of the Asian American Center for Advancing Justice. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society, with a specific focus directed toward addressing the needs of low-income, immigrant and underserved APIs. As the oldest Asian American legal rights organization devoted to protecting the civil rights of all racial and ethnic minorities, we have a strong interest in protecting the integrity of the core constitutional principle of equal protection under the law for all Americans.

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, Native Hawaiian 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.

Chinese for Affirmative Action ("CAA") is a community-based nonprofit organization founded to defend civil rights and advance multiracial democracy. Though our constituency includes the broader Asian American and Pacific Islander community, we prioritize the needs of the most marginalized. Our community building, research and analysis, and policy advocacy activities promote equality in a number of areas including immigrant rights, language diversity, racial justice, and marriage equality.

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-pronged strategy of law and public policy advocacy, building effective progressive alliances, and strategic public communications, EJS's principal objective is to combat discrimination and inequality in America.

Equality California is a state-wide advocacy group protecting the needs and interests of lesbian, gay, bisexual, and transgender Californians and their families, including members of same-sex couples and their children. Equality California is California's largest lesbian, gay, bisexual, and transgender civil rights organization, with members in every county in the State of California. Equality California's members include same-sex couples who married in California before Proposition 8's enactment; same-sex couples who are married under the laws of

other jurisdictions; same-sex couples who have registered with the State of California as domestic partners; and same-sex couples who wish to marry in the state of California but cannot do so while Proposition 8 is being enforced.

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.

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

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.

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

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.

Impact Fund is a non-profit foundation that provides funding, training, and co counsel to public interest litigators across the country. It is a State Bar Legal Services Trust Fund Support Center, assisting legal services projects across

California. The Impact Fund is counsel in a number of major civil rights class actions.

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

The **Jewish Alliance for Law and Social Action** ("JALSA") works on issues of social and economic justice, civil rights, and constitutional liberties. Through legislation, litigation, and social action, JALSA members have worked to prohibit discrimination based on race, religion, ethnicity, gender, age, sexual orientation, and gender identity. As amici in *Bowers v. Hardwick*, *Lawrence v. Texas*, and *Goodridge v. Dept. of Public Health*, and as participants in major legislative campaigns, both as JALSA and our earlier presence as American Jewish Congress, New England, JALSA members have been early advocates for equal rights and full protection of the law for lesbian, gay, bisexual and transgender people. JALSA provided key leadership in the campaign for Massachusetts recognition of same-sex couples' equal marriage rights.

The **Lawyers' Committee for Civil Rights of the San Francisco Bay Area** ("LCCR") is affiliated with the national Lawyers' Committee for Civil Rights

Under Law, established in 1963 at the urging of President John F. Kennedy. LCCR was formed to support the rights of minority and low-income persons by offering free legal assistance in civil matters and by litigating cases on behalf of the traditionally underrepresented. In addition, LCCR monitors judicial proceedings and legislation that affect the traditionally disadvantaged and frequently files *amicus* briefs in cases challenging discriminatory policies and practices. Because advancing the rights of LGBT individuals is integral to any civil rights agenda, LCCR's *amicus* work has encompassed these issues as well.

The **Legal Aid Society–Employment Law Center** ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities. Since 1970, LAS–ELC has represented plaintiffs in employment cases, particularly those of special import to communities of color, women, recent immigrants, individuals with disabilities, and LGBT individuals.

Established in 1968, the **Mexican American Legal Defense and Educational Fund** ("MALDEF") is the leading national civil rights organization representing the 40 million Latinos living in the United States though litigation, advocacy, and educational outreach. With its headquarters in Los Angeles and offices in Chicago, Sacramento, San Antonio and Washington, D.C., MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil

rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment under the law of Latinos, and is a respected public policy voice in Sacramento and Washington, D.C. on issues affecting Latinos. MALDEF sets as a primary goal defending the right of all Latino families to equal treatment under law, including those headed by lesbian or gay Latinos who wish the equal right to marry and in which Latino children are disadvantaged because their same-sex parents are denied civil marriage.

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

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** is a national association of lawyers, judges, and other legal professionals, law students, activists, and affiliate LGBT legal organizations. The LGBT Bar Association promotes justice in and through the legal profession for the LGBT community in all its diversity

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

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.

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

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. SPLC's advocacy and impact litigation on behalf of the lesbian, gay, bisexual, and transgender community spans decades – from an early case challenging the military's anti-gay policy, *Hoffburg v. Alexander*, to the monitoring of anti-gay hate and extremist groups today.

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