No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, BAR ASSOCIATIONS AND PUBLIC INTEREST AND LEGAL SERVICE ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are a coalition of bar associations, civil and human rights groups, and public interest and legal service organizations committed to preventing, combating, and redressing discrimination, and protecting the equal rights of women and minorities in the United States, including African-Americans, Latinos, Asian Americans and Pacific Islanders, and

lesbian, gay, bisexual, and transgender people.[1] Amici have a vital interest in ensuring that the Constitution's guarantee of equal protection effectively protects all people from invidious discrimination and have filed this brief to address an issue of overriding importance in this case: the proper standard for reviewing governmental action that discriminates on the basis of sexual orientation. Amici urge the Court to hold that classifications based on sexual orientation are subject to heightened scrutiny, so that governments cannot use invented, after-the-fact rationalizations to mask and justify discrimination based on prejudice, antipathy, or baseless stereotypes. Discrimination based on sexual orientation bears the same essential hallmarks as other kinds of discrimination that have long received heightened scrutiny, and it should be treated no differently under the law.

Amici include the following organizations: The Leadership Conference on Civil and Human Rights, 9to5, American Association of University Women, American Civil Liberties Union, API Equality-Northern California, Asian American Institute, Asian American Justice Center, Asian & Pacific Islander American Health Forum, the Asian Law Caucus, the Boston Bar Association, the Center for American Progress, the Charles Houston Bar Association, Chinese for Affirmative Action, the Connecticut Women's Education and Legal Fund, the

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Courage Campaign, Empire Justice Center, Empire State Pride Agenda, Equal Rights Washington, EqualityMaine, Equality Maryland, Hispanic National Bar Association, Human Rights Campaign, Japanese American Citizens League, League of United Latin American Citizens, Legal Aid Society, the Lesbian, Gay, Bisexual & Transgender Community Center in New York City, LGBT Bar Association of Greater New York, Massachusetts LGBTQ Bar Association, MassEquality, Mattachine Society of Washington, D.C., Mexican American Legal Defense and Educational Fund, National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, National Action Network, National Black Justice Coalition, National Council of La Raza, National Gay and Lesbian Task Force Foundation, National LGBT Bar Association, National Organization for Women Foundation, New York Legal Assistance Group, New York State Bar Association, OCA – Asian Pacific American Advocates, One Iowa, Out & Equal Workplace Advocates, Permanent Commission on the Status of Women, Public Advocates Inc., Rainbow PUSH Coalition, Secular Woman, South Asian Bar Association of Connecticut, Vermont Freedom to Marry Task Force, and the Women's Bar Association of the State of New York. Descriptions of the amici are set forth in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

For years, lower courts erroneously declined to accord heightened scrutiny to sexual orientation classifications based on this Court's decision in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), reasoning that if it were permissible to criminalize the conduct that was viewed as defining the class, distinctions

based on sexual orientation could not be presumptively illegitimate. Now that the Court has overruled *Bowers*, however, any perceived impediment to the application of heightened scrutiny has been removed. To determine whether to afford heightened scrutiny in this case, the Court should look to the settled criteria it has long applied to its equal protection jurisprudence.

Using those criteria, the Court has always afforded heightened scrutiny to discrimination against groups, like gay people,[2] that have experienced a history of purposeful discrimination based on a factor that bears no relation to their ability to perform in or contribute to society. The Court has sometimes considered other factors in its determination of the correct level of scrutiny, such as the immutability or distinctiveness of a characteristic or the relative political power of a disfavored group. But it has never employed those factors to deny heightened scrutiny to laws burdening a group that has historically faced discrimination unrelated to the ability to contribute to society. Rather, in those circumstances the Court presumes the unequal treatment is based on deep-seated prejudice or baseless stereotypes and requires a more searching review of the actual grounds for the discrimination to prevent governments from justifying it with *post hoc* rationales.

Under these criteria, there is little question that sexual orientation classifications warrant heightened scrutiny. Gay people have experienced a long and painful history of deliberate discrimination and this

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[2] As used in this brief, the term gay people includes gay men, lesbians, and bisexual people.

discrimination is based on a factor unrelated to their ability to perform in or contribute to society. Indeed, this discrimination is particularly deep-seated and hostile because it has historically been based on deeply-felt moral views. Particularly after *Lawrence* v. *Texas*, 539 U.S. 558 (2003), private moral judgments cannot be employed to justify public governmental discrimination based on sexual orientation.

Moreover, although considerations of immutability or relative political power should not be determinative here, those considerations also support a finding of heightened scrutiny. As with other classifications that have been held to warrant such scrutiny, sexual orientation is a distinctive characteristic that remains a target of prejudicial discrimination, both public and private. Even if sexual orientation were theoretically subject to voluntary change—and the overwhelming weight of scientific evidence is to the contrary—it is a central aspect of a person's identity, just as heterosexuality is, that one should not be required to change in order to avoid discrimination. Finally, to the extent a calculation of political power has any place in the heightened scrutiny analysis, gay people remain a small and underrepresented minority who continue to face an uphill struggle in the political process.

For all these reasons, amici urge the Court to hold that sexual orientation classifications are subject to heightened scrutiny. Moreover, even though the law at issue also fails rational basis scrutiny, amici urge the Court to require heightened scrutiny because of the important deterrent effect that such a holding provides, by making clear to governmental decisionmakers that sexual orientation discrim-

ination cannot continue absent a convincing justification. A decision that leaves the appropriate standard of scrutiny unresolved will potentially subject gay people to continued discrimination until the Court has the opportunity to address the issue again. By holding that classifications based on sexual orientation are presumptively invalid, the Court will help ensure that such distinctions will no longer form the basis for governmental discrimination.

ARGUMENT

I. *LAWRENCE* REMOVED ANY PERCEIVED IMPEDIMENT TO THE RECOGNITION OF HEIGHTENED SCRUTINY FOR SEXUAL ORIENTATION CLASSIFICATIONS.

According heightened scrutiny to governmental discrimination based on sexual orientation requires no departure from existing law. To the contrary, such a holding requires only the application of long-settled precedent, because discrimination against gay people bears the same features that earlier led to heightened scrutiny of other classifications such as those based on sex or race. This application of heightened scrutiny would likely have occurred long ago if it had not been for the Court's erroneous decision in *Bowers*. Now that *Bowers* has been overruled, the way has been cleared for the Court to confirm that discrimination against gay people is presumptively illegitimate.

For nearly two decades *Bowers* was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. Unfortunately, but not surprisingly, lower courts also accepted the invitation. Even

though *Bowers* was decided on due process grounds, courts relied on that decision to bypass the Court's traditional equal protection analysis in refusing to apply heightened scrutiny for classifications based on sexual orientation.

Before *Bowers*, the Court developed clear principles for determining whether discriminatory classifications warrant heightened scrutiny. Those principles considered whether the impacted group faced a long history of discrimination based on a characteristic that typically bears no relation to an individual's ability to contribute to society. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). Under this framework, both members of this Court as well as scholars concluded that sexual orientation classifications warranted heightened scrutiny.[3]

Then came *Bowers*, which upheld, under the Due Process Clause, a state law that criminalized so-called "homosexual sodomy." *Bowers*, 478 U.S. at 191. Thereafter, circuit courts began summarily rejecting heightened scrutiny for sexual orientation classifications with no analysis of the factors recognized in *Cleburne* and other cases.[4] Their

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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*) (state action based on sexual orientation should be "subjected to strict, or at least heightened, scrutiny"); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 162-64 (1980); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985).

[4] *See*, *e.g.*, *Richenberg* v. *Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Equal. Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 54 F.3d 261, 267-68 (6th Cir. 1995), *vacated and remanded* 518 U.S. 1001 (1996); *Jantz* v. *Muci*, 976 F.2d 623

reasoning relied, instead, on the mere existence of *Bowers*: if the Constitution went so far as to permit the criminalization of "behavior that defines the class," *Padula*, 822 F.2d at 103, then the Constitution—whether under the Due Process or Equal Protection clause—must likewise permit discrimination against the class.

With the invalidation of *Bowers* in 2003, however, this line of reasoning collapses. In *Lawrence*, the Court overruled *Bowers* and denounced that decision as incorrect when it was decided. 539 U.S. at 578. In doing so, the Court removed the barriers erroneously erected by *Bowers*, clearing the path for a return to the long-standing principles of equal protection jurisprudence. By confirming that there is constitutional protection for the "full right to engage" in the behavior that courts perceived as defining the class, *Lawrence* eliminated *Bowers* as a basis for denying heightened scrutiny for sexual orientation classifications. *Id.*[5] While courts had interpreted

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(10th Cir. 1992); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). There were dissenting voices, *see*, *e.g.*, *Watkins* v. *U.S. Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of reh'g en banc), but they did not prevail over the invocations of *Bowers*.

[5] After *Lawrence*, circuit courts continued to deny heightened scrutiny by following pre-*Lawrence* precedents. *See*, *e.g.*, *Witt* v. *U.S. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1114 n.9 (10th Cir. 2008); *Scarbrough* v. *Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Lofton* v. *Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *see also Cook* v.

Bowers to foreclose heightened scrutiny for the class, *Lawrence* acknowledged that "equality of treatment" and the due process right to engage in the protected conduct were "linked in important respects" and that a tenable argument existed for invalidating the statute at issue under the Equal Protection Clause. *Id.* at 574-575.

After *Lawrence*, *Bowers* can no longer be relied on to create a barrier to heightened scrutiny for sexual orientation classifications. Instead, heightened scrutiny is warranted based on the same factors that have led to the recognition that other classifications merit careful review under the Equal Protection Clause. Amici urge this Court to expressly affirm that heightened scrutiny is the proper standard and thereby make clear to both governments and lower courts that such discrimination cannot be sustained unless the government can demonstrate at least a significant justification.

II. SEXUAL ORIENTATION CLASSIFICATIONS WARRANT HEIGHTENED SCRUTINY.

A. Sexual Orientation Classifications Raise The Same Concerns As Other Classifications Accorded Heightened Scrutiny.

The Court accords heightened scrutiny when a discriminatory classification is based on a factor that is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class

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Gates, 528 F.3d 42, 61 (1st Cir. 2008) (mistakenly relying on *Romer* v. *Evans* as holding that rational basis review is always required).

are not as worthy or deserving as others," or that "generally provides no sensible ground for differential treatment." *City of Cleburne*, 473 U.S. at 440-41. Where a discriminatory classification is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," laws "predicated on such prejudice [are] easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).

Rational basis review is inappropriate where a law targets a historically disfavored group based on a characteristic that has no bearing on an individual's ability to contribute to society. In these circumstances, the ordinary presumption of constitutionality gives way and it is not enough to sustain discrimination for lawyers to come up with a *post hoc* rational basis. Rather, for such discrimination the Court requires a greater justification, to ensure that discrimination based on deep-seated historical prejudice or baseless stereotypes is not masked by makeweight, *post hoc* rationales.

To date, the Court has recognized that heightened scrutiny is warranted when governments discriminate based on race, sex, illegitimacy, alienage, and national origin. *See Romer* v. *Evans*, 517 U.S. 620, 629 (1996); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).[6] On the other hand, it has declined such

[6] Classifications based on religion also warrant heightened scrutiny, but this standard of review is separately justified by the Free Exercise Clause of the First Amendment. *See*, *e.g.*, *Locke* v. *Davey*, 540 U.S. 712, 720 n.3 (2004).

scrutiny for classifications based on mental disability, age, wealth, or close family relationship. *See Lyng* v. *Castillo*, 477 U.S. 635 (1986); *City of Cleburne*, 473 U.S. at 443; *Mass. Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

While the Court has looked at several factors in determining whether a classification warrants heightened scrutiny, it has always accorded such scrutiny when two factors are present: (1) the disfavored group has faced a history of discrimination that is (2) based on a characteristic that does not bear upon a person's ability to contribute to society. *See Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008) (discussing precedents).

Every group the Court has found to be a protected class has suffered a history of discrimination akin to that suffered by gay people. As with racial and national origin discrimination, according heightened scrutiny to sex discrimination "responds to volumes of history." *United States* v. *Virginia*, 518 U.S. 515, 531 (1996). Similarly, although "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and [African-Americans]," *Matthews* v. *Lucas*, 427 U.S. 495, 506 (1976), the historical burdens of unwed mothers and illegitimate children, including the "disapproval of family and community," were still found to justify heightened scrutiny. *Mills* v. *Habluetzel*, 456 U.S. 91, 99-100 (1982) (O'Connor, J., concurring).

In contrast, the Court has declined to apply heightened scrutiny to classifications based on wealth because, among other things, the less well-off

constitute a "large, diverse, and amorphous class" that has not had a "history of purposeful unequal treatment." *Rodriguez*, 411 U.S. at 28. The Court has applied a similar analysis to the aged. *Murgia*, 427 U.S. at 313.

Moreover, classifications subject to strict scrutiny, such as race, national origin, and alienage, are deemed suspect because these traits are "seldom relevant to the achievement of any legitimate state interest." *City of Cleburne*, 473 U.S. at 440. Similarly, classifications based on sex and illegitimacy warrant heightened scrutiny because these characteristics typically bear no relation to an individual's ability to participate in and contribute to society. *Frontiero* v. *Richardson*, 411 U.S. 667, 686 (1973) (plurality); *Matthews*, 427 U.S. at 505.

In analyzing whether a classification warrants heightened scrutiny, the Court has sometimes remarked on other factors, including the relative immutability of a characteristic or the political power of the disfavored group. *See, e.g.*, *Frontiero*, 411 U.S. at 678 (plurality); *City of Cleburne*, 473 U.S. at 440. But it has never denied heightened scrutiny where—as with sexual orientation classifications—the disfavored group has experienced a painful history of discrimination based on deep-seated prejudice unrelated to its ability to contribute to society. Indeed, "[t]he irrational nature of the prejudice directed at gay persons, who 'are ridiculed, ostracized, despised, demonized, and condemned' merely for being who they are is entirely different in kind than the prejudice suffered by other groups that previously have been denied suspect or quasi-suspect class status." *Kerrigan*, 957 A.2d at 446 (quoting *Snetsinger* v. *Montana Univ. Sys.*, 104 P.3d 445, 454

(Mont. 2004) (Nelson, J., concurring)) (internal quotation marks omitted).

With regard to a characteristic's "immutability," the Court has employed that term only occasionally, and only in the context of examining whether the victims of discrimination "exhibit obvious, immutable, *or* distinguishing characteristics that define them as a discrete group." *Lyng*, 477 U.S. at 638 (emphasis added); *accord Bowen* v. *Gilliard*, 483 U.S. 587, 602-03 (1987). As the disjunctive phrasing shows, this factor, to the extent relevant, simply looks to whether the class shares distinguishing features, not whether those features are always permanent or obvious at birth. Thus, the Court has expressly rejected the proposition that alienage classifications should not be subject to strict scrutiny because "a resident alien can voluntarily withdraw from disfavored status." *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 n.11 (1977); *see also City of Cleburne*, 473 U.S. at 442 n.10 ("'[T]here's not much left of the immutability theory, is there?'") (quoting John Hart Ely, *Democracy and Distrust* 150 (1980)). Indeed, while some individuals do change their sex, it has never been suggested that this fact would have any bearing on the application of heightened scrutiny to sex-based classifications. *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

Likewise, despite a few references in the Court's jurisprudence to whether a disfavored group lacked political power, that has never been a dispositive factor in denying heightened scrutiny where there has been historical discrimination based on a factor irrelevant to societal contributions. The *Frontiero* plurality expressly acknowledged that "when viewed in the abstract, women do not constitute a small and

powerless minority," 411 U.S. at 686 n.17, but nevertheless determined that sex-based classifications demanded heightened scrutiny given the long history of discrimination based on a characteristic that bears little or no relationship to an individual's ability to contribute to society.

Thus, heightened scrutiny continues to apply to sex-based classifications, even though women have always outnumbered men and are an increasingly powerful political demographic. *See City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring and dissenting) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."); *Kerrigan*, 957 A.2d at 452-53. Nor can the decision to employ heightened scrutiny for a classification depend on unprovable and continually changing calculations about whether a particular group has a degree of political power deemed sufficient to protect itself in all legislative fora.

As explained below, all the factors considered in the Court's precedents warrant heightened scrutiny for sexual orientation classifications. But it is sufficient that gay people have experienced a painful history of prejudicial discrimination based on a factor that bears no relation to their ability to contribute to society. Such discrimination is presumptively illegitimate and therefore requires more than *post hoc* rationalizations to justify it.

B. Gay People Have Suffered A Long History Of Prejudicial Discrimination.

As noted, this Court has applied heightened scrutiny when a group has experienced a "history of

purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313 (internal quotation marks omitted); *see also Virginia*, 518 U.S. at 531-32 ("[O]ur Nation has had a long and unfortunate history of sex discrimination * * * ") (quoting *Frontiero*, 411 U.S. at 684) (internal quotation marks omitted). Sexual orientation discrimination plainly fits this description.

The long history of discrimination against gay people is incontestable. Many courts have acknowledged the reprehensible history of purposeful discrimination by state and local governments in areas such as public employment; denial of child custody and visitation rights; denial of the ability to associate freely; and legislative efforts including local initiatives to repeal laws that protect gay people from discrimination.[7] Simply put, it is beyond reasonable dispute—and not seriously disputed in this case—that "gay persons historically have been, and continue to be, the target of purposeful and

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[7] *See*, *e.g.*, *Ben-Shalom*, 881 F.2d at 465-66 ("Homosexuals have suffered a history of discrimination and still do."); *Pedersen* v. *Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 317 (D. Conn. 2012) ("[H]omosexuals have suffered a long history of invidious discrimination."); *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985 (N.D. Cal. 2012) ("There is no dispute in the record that lesbians and gay men have experienced a long history of discrimination."); *see also Rowland*, 470 U.S. at 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*) ("[H]omosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely to reflect deep-seated prejudice rather than * * * rationality.") (internal quotation marks omitted).

pernicious discrimination due solely to their sexual orientation." *Kerrigan*, 957 A.2d at 434.

The instances of such discrimination are too numerous and widespread to catalogue here. But the actions of the federal government alone illustrate the degree to which that discrimination was based on antipathy and prejudice. As shown in the record before this Court, gay people were long barred from federal employment because it was believed that "efficiency" would be disrupted by the "revulsion of other employees by homosexual conduct;" that other employees would fear "homosexual advances, solicitations or assaults;" that there would be "unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower, and living facilities;" that it would be an "offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business;" and that "the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth." *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 981-82 (N.D. Cal. 2010) (citations and quotations omitted).

It was also believed that "the presence of a sex pervert"—at that time a common term for gay people—in a government agency "tends to have a corrosive influence on his fellow employees" because "[t]hese perverts will frequently attempt to entice normal individuals to engage in perverted practices. * * * One homosexual can pollute a Government office." *Id.* at 983-84 (quoting *Employment of Homosexuals and Other Sex Perverts in Government*, S. Rep. No. 81-241, 81st Congress, 2d Sess. 4 (1950)); *see also Conaway* v. *Deane*, 932 A.2d

571, 610 (Md. 2007) (government sought to justify ban on employment on the view that gay people "lack[ed] the emotional stability of normal persons") (citation omitted). Gay welfare organizations were similarly denied federal tax exemptions on the view they promoted "perverted or deviate behavior" that is "contrary to public policy and [is] therefore, not 'charitable.'" *Perry*, 704 F. Supp. 2d at 981. And much historical animus against gay people was based on the view that they were inevitably or predominately child molesters. *See*, *e.g.*, *id.* at 984 (quoting 1949 statement by Special California Assistant Attorney General that "[a]ll too often we lose sight of the fact that the homosexual is an inveterate seducer of the young of both sexes * * * and is ever seeking for younger victims.").

Nor is this discrimination a recent innovation. Despite some attempts to portray discrimination based on sexual orientation as merely a 20th century phenomenon—a sordid record that itself would warrant heightened scrutiny—such discrimination has far deeper roots. Discrimination against and social disapproval of, same-sex sexual intimacy have existed in America since the time of the first settlers. Joint Appendix at 345-48*, United States* v. *Windsor*, No. 12-307 *("Windsor* J.A.). These attitudes were reflected in colonial and state criminal prohibitions targeting same-sex sexual conduct. *Pedersen,* 881 F. Supp. 2d at 314. When individuals started to identify as gay from the late 19th century onward, that long-existing social stigma was transformed into discrimination against gay people as a class. *Id.* Therefore, "the affirmative legislation of anti-gay policing that arose in the twentieth century was not

reflective of an absence of prior discrimination or the emergence of a new form of discrimination." *Id.*[8]

Moreover, homosexuality was long viewed as a psychological disorder. *See Golinski*, 824 F. Supp. 2d at 986; *Perry*, 704 F. Supp. 2d at 967. Until the 1970s, the United States military "treated homosexuals as unfit for service because they had a 'personality disorder' or a 'mental illness.'" *Able*, 968 F. Supp. at 855 (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Sen. Comm. on Armed Servs.*, S. Hrg. No. 103-845, 103rd Cong., 2d Sess. (1993)).

Thus, "for centuries there have been powerful voices to condemn homosexual conduct as immoral" and the criminalization of that conduct "demean[ed] the lives of homosexual persons." *Lawrence*, 539 U.S. at 571, 575. And as noted, the Court has made clear that when homosexual conduct is criminalized "that declaration in and of itself is an invitation to subject homosexual persons to discrimination." *Id.* at 575. Discriminating against conduct closely associated with the class is functionally the same as discriminating against the class itself.[9]

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[8] *See also Able* v. *United States*, 968 F. Supp. 850, 854 (E.D.N.Y. 1997) (noting that the "'earliest and most drastic legislation against gay people enacted by any government of the High Middle Ages' were laws passed by the European conquerors of Jerusalem imposing death by burning on homosexual men") (quoting John Boswell, *Christianity, Social Tolerance and Homosexuality* 281 (1990)), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998).

[9] *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law* v. *Martinez*, 130 S. Ct. 2971, 2990 (2010) (noting that the Court has "declined to distinguish between status and conduct" when faced with discrimination targeted at

The discrimination experienced by gay people, moreover, is particularly ingrained in society. It is not merely predicated on unfounded stereotypes about the inability of gay people to contribute to society, but has historically been based on a deep-seated notion that gay people themselves are a moral affront to society itself. *Kerrigan*, 957 A.2d at 444 ("That prejudice against gay persons is so wide-spread and so deep-seated is due, in large measure, to the fact that many people in our state and nation sincerely believe that homosexuality is morally reprehensible."). Although individuals are free to hold these views, the Constitution's equal protection guarantee prevents such prejudice from being given the force of law: "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti,* 466 U.S. 429, 433 (1984). Given this clear historical record of prejudicial discrimination, laws that perpetuate it warrant heightened scrutiny.

C. Sexual Orientation Bears No Relation To A Person's Ability To Perform In Or Contribute To Society.

It is likewise indisputable that sexual orientation bears no relation to a person's ability to perform in or

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"homosexual conduct"); *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("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.").

contribute to society.[10] *Cf. Frontiero*, 411 U.S. at 686 (plurality) ("[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."). Being gay or bisexual does not cause one to "have a reduced ability to cope with and function in the everyday world." *City of Cleburne*, 473 U.S. at 442. Indeed, all of the burdens that have been imposed because of sexual orientation have been artificial, as gay people, like other groups found to be protected classes, have been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313. Gay people have historically suffered discrimination not because they cannot contribute to society but because of moral disapproval and the view that their mere presence will cause discomfort to those around them. *See, e.g.*, *Steffan* v. *Perry*, 41

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[10] *See*, *e.g.*, *Watkins*, 875 F.2d at 725 (Norris, J., concurring) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society * * * "); *Equality Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994) ("[S]exual orientation * * * bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society."), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996); *Jantz* v. *Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) ("As a class-defining trait, sexual orientation 'bears no relation to ability to perform or contribute to society.'") (quoting *Frontiero*, 411 U.S. at 686), *rev'd* 976 F.2d 623 (10th Cir. 1992); *Kerrigan*, 957 A.2d at 434 ("The defendants also concede that sexual orientation bears no relation to a person's ability to participate in or contribute to society, a fact that many courts have acknowledged, as well.").

F.3d 677, 682-83 (D.C. Cir. 1994) (en banc) (quoting military's rationale for ban on gay servicemembers).

Particularly after *Lawrence*, moral disapproval of homosexual conduct can provide no basis for denying equal treatment or heightened scrutiny. As noted above, although some courts had held that the criminalization of such conduct justified lenient review of sexual orientation classifications, the decision in *Lawrence* eliminated that argument. *See supra* at 6-9; *Lawrence*, 539 U.S. at 575 ("When 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 both in the public and in the private spheres.").

Nor can heightened scrutiny be denied by arguing that rational bases exist to justify sexual orientation discrimination in certain circumstances. *Cf. Citizens for Equal Protection* v. *Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (holding that because a rational basis existed to prohibit same-sex marriage "Appellees are not entitled to strict scrutiny review on this ground"). As this Court has explained, when considering whether heightened scrutiny should apply, the Court "should look to the likelihood that governmental action premised on a particular classification is valid *as a general matter*, not merely to the specifics of the case before us." *City of Cleburne*, 473 U.S. at 446 (emphasis added). Thus, whether discrimination on the basis of sexual orientation warrants heightened scrutiny must be resolved based on the application of the relevant factors to sexual orientation discrimination *in general*. This inquiry is prior to and distinct from whether a particular statute that discriminates on that basis is supported by constitutionally sufficient justifications.

D. Sexual Orientation Is A Distinguishing Characteristic That Defines A Discrete Group.

As explained above, *see supra* at 12-13, the perceived immutability of a particular trait is not a necessary factor to identify a protected class. Rather, it is sufficient that there are "distinguishing characteristics that define * * * a discrete group." *Bowen*, 483 U.S. at 602. Indeed, the very existence of laws drawing distinctions based on that criterion demonstrates that gay people are a discrete group who share a distinguishing characteristic. The class is sufficiently discrete for it to be the subject of discriminatory legislation and it is therefore sufficiently discrete for it to be the subject of heightened scrutiny.

As the Court held in *Lawrence*, sexual orientation is an integral component of a person's identity, and gay people cannot be required to sacrifice it any more than heterosexual people may be required to do so. 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."); *see also Christian Legal Soc'y*, 130 S. Ct. at 2990 ("Our decisions have declined to distinguish between status and conduct in this context."). Thus, to the extent immutability matters at all, the relevant question is not whether sexual orientation is theoretically alterable for some, but whether a person should be compelled to change it, even if theoretically possible, in order to avoid discriminatory treatment. The answer to that question is plainly no.[11] The law at issue here, for

[11] *See*, *e.g.*, *Pedersen*, 891 F. Supp. 2d at 326 ("Where there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity, the characteristic

example, is directed specifically at individuals who have entered into long-term committed relationships with a person of the same sex. For purposes of equal protection analysis, their sexual orientation is just as immutable as that of a heterosexual couple and any other characteristic that has warranted heightened scrutiny in the past.

Just like other classifications that warrant heightened scrutiny, discrimination based on sexual orientation unfairly burdens a group based on "circumstances beyond their control." *Plyler*, 457 U.S. at 216 n.14. The overwhelming weight of scientific evidence establishes that sexual orientation is not subject to voluntary change. Indeed, this Court has before it an unchallenged determination, based on a factual record developed in an adversarial proceeding, that "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." *Perry*, 704 F. Supp. 2d at 966; *see also Golinski*, 824 F. Supp. 2d at 986 ("[T]he consensus in the scientific community is that sexual orientation is an immuta-

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should be considered immutable and an individual should not be required to abandon it."); *Golinski*, 824 F. Supp. 2d at 987 ("[A] person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it."); *Kerrigan*, 957 A.2d at 438 (sexual orientation is "'so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it] * * * .'") (quoting *Watkins*, 875 F.2d at 726 (Norris, J., concurring in the judgment)); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("[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.").

ble characteristic."); American Psychological Association, *Sexual Orientation and Homosexuality*, (www.apa.org/helpcenter/sexual-orientation.aspx) (sexual orientation is not a "conscious choice that can voluntarily be changed"); Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 226 (1994) (describing "lack of empirical support for conversion therapy"). Thus, heightened scrutiny is required because sexual orientation is not subject to voluntary change and, even if it were, it is a fundamental aspect of human identity that people should not be required to alter in order to avoid discrimination.

E. Gay People Remain Disadvantaged In The Political Arena.

As shown above, *supra* at 12-14, the relative political power of gay people is not essential to the heightened scrutiny inquiry. But to the extent this factor is relevant, it strengthens the presumptive invalidity of sexual orientation classifications. Gay people are a tiny fraction of the population who are politically underrepresented and continue to face ongoing, systemic discrimination.

Particularly when compared to women—a protected class that comprises more than half the population—gay people are a small minority. Although estimates vary, government surveys have found that less than 5% of the population self-identifies as gay or bisexual. *See* National Ctr. for Health Statistics, *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006–2008 National Survey of Family Growth* at 31 (www.cdc.gov/nchs/data/nhsr/nhsr036.pdf).

That small minority becomes even smaller when one looks at political representation, as "openly gay officials are underrepresented in political office in proportion to the gay and lesbian population." *Pedersen*, 881 F. Supp. 2d at 328; *cf. Frontiero*, 411 U.S. at 686 & n.17 ("when viewed in the abstract, women do not constitute a small and powerless minority" but "in part because of past discrimination, women are vastly underrepresented in the Nation's decisionmaking councils") (plurality). As of 2011, only 1.2% of state legislators nationwide were openly gay, and there had been only seven such members of Congress in history. *See* Aff. of Gary Segura ("Segura Aff.") at ¶¶ 45-46, *Windsor* v. *United States*, No. 10-cv-8435 (S.D.N.Y.) (filed May 17, 2011) (*Windsor* J.A. at 415-16).

The percentage of openly gay people holding local public office is even lower. In 2010, only .05% of the more than 500,000 city, county, school, and local board officials in this country were openly gay. *Id.* ¶ 47 (*Windsor* J.A. 416). There are no congressional districts or municipalities with a majority gay population. *Id.* ¶ 49 (*Windsor* J.A. 417). There has never been an openly gay Cabinet member. Nor has there ever been an openly gay federal circuit court judge, with only two ever having been nominated, one of whom withdrew without having been confirmed. *See* Dan Levine, *Obama Nominates Openly Gay Lawyer For Patent Appeals Court* (Feb. 7, 2013) (www.reuters.com/article/2013/02/07/us-usa-court-gay-idUSBRE91614E20130207).

Much of this underrepresentation is due directly to the history of discrimination against gay people. Gay people expose themselves to the very discrimination they seek to eliminate when they

acknowledge their identity in an effort to protest discriminatory practices. *See* Kenneth D. Wald, "The Context of Gay Politics," in *The Politics of Gay Rights* at 1, 14 (C. Rimmerman, K. Wald & C. Wilcox eds., 2000) ("The awareness of public hatred and the fear of violence that often accompanies it undermine efforts to develop an effective gay political identity," which "may explain why many gay officials hide their sexual orientation until they have built up considerable public trust"). Thus, four of the seven openly gay members of Congress in history were first elected with their sexual orientation not publicly known. Segura Aff. ¶ 46 (*Windsor* J.A. 415).

Regardless whether some legislatures or voters in some places have taken action to redress some historical wrongs, discrimination against gay people (as this case demonstrates) remains largely unchecked. Societal discrimination against gay people is pervasive, with nearly half reporting mistreatment or harassment in the workplace based on their sexual orientation.[12] Yet there is no federal legislation prohibiting discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing. *Pedersen*, 881 F. Supp. 2d at 328; *Golinski*, 824 F. Supp. 2d at 988. Indeed, although federal employment non-

[12] *See* Katie Miller and Jeff Krehely, *New Data Demonstrates Unique Needs of Gay and Transgender Families*, Center for American Progress (Oct. 31, 2012) (www.americanprogress.org/issues/lgbt/news/2012/10/31/43383/new-data-demonstrate-the-unique-needs-of-gay-and-transgender-families/); Jerome Hunt, *Why the Gay and Transgender Population Experiences Higher Rates of Substance Abuse*, Center for American Progress (Mar. 9, 2012) (www.americanprogress.org/issues/lgbt/report/2012/03/09/11228/why-the-gay-and-transgender-population-experiences-higher-rates-of-substance-use/).

discrimination legislation has been introduced regularly since 1994 (with earlier versions existing as far back as the 1970s), it has never passed Congress regardless of which party was in control. Segura Aff. ¶ 29 (*Windsor* J.A. 405).

Similarly, a majority of states have no statutory protection against sexual orientation discrimination in employment or public accommodations. *Id.* ¶ 33 (*Windsor* J.A. 408-09). Nor have other issues important to gay people fared well in legislatures or at the ballot box. A study of 143 votes from the 1970s through 2005 found that gay and lesbian rights were defeated or overturned more than 70% of the time, with the opponents of those rights prevailing at about the same rate for local and state elections. *Id.* ¶ 36 (*Windsor* J.A. 410). And while in 1990 there were no constitutional provisions banning marriage for same-sex couples, currently three fifths of the states have such amendments and another 11 states affirmatively prohibit it by statute. *Id.* at ¶ 34 (*Windsor* J.A. 409).

Any incremental gains in redressing sexual orientation discrimination through the political process pale in comparison to the political advances made by women when heightened scrutiny was first applied to them and thereafter. *See*, *e.g.*, *Kerrigan*, 957 A.2d at 452 (gay people have "a good deal less" political influence than women, as a group, enjoyed at the time of *Frontiero*). By the time the Court applied intermediate scrutiny to sex-based classifications, *see Craig* v. *Boren*, 429 U.S. 190 (1976), Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 had been in effect for more than a decade. *See Frontiero*, 411 U.S. at 687-88. These legislative protections did not eradicate

invidious discrimination on the basis of sex, which continues to this day. And they did not stop this Court from holding that discrimination on the basis of sex must be subjected to heightened scrutiny. Nor has the ever-increasing political power of women decreased the need to ensure that discriminatory classifications are not perpetuating historical stereotypes and prejudice.

It is therefore clear that despite some recent advances there exists with respect to gay people "a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *City of Cleburne*, 473 U.S. at 443. Gay people remain intensely vulnerable in the majoritarian political arena and have been unable to rely on the traditional legislative processes to protect them from discrimination. Given that much antipathy towards gay people stems from "profound and deep convictions accepted as ethical and moral principles," *Lawrence*, 539 U.S. at 571, discrimination based on sexual orientation is particularly deep-seated. According heightened scrutiny to such classifications is necessary to ensure that distinctions based on these convictions do not manifest themselves as invidious governmental discrimination unrelated to a person's ability to contribute to society.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

AMICI CURIAE

The **Leadership Conference on Civil and Human Rights** ("The Leadership Conference") is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States.[1] It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals, and toward this end, urges the Court to hold that sexual orientation classifications should be subject to heightened scrutiny. The Leadership Conference believes that every person in the United States deserves to be free from discrimination based on race, ethnicity, gender, or sexual orientation.

9to5 is a national membership-based organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. Our membership includes lesbian, bisexual and transgender women. Our members and constituents are directly affected by workplace discrimination and poverty, among other issues. 9to5 is committed to combating all forms of oppression, and has actively supported local, state and federal policy efforts to

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[1] A list of the Leadership Conference's participating members is included at the end of this Appendix.

prohibit discrimination based on sexual orientation, gender identity and gender expression in the workplace, in the legal system, in educational institutions, in public programs, and in family rights. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

The **American Association of University Women** ("AAUW"), an organization of more than 150,000 members and supporters, has been a catalyst for the advancement of women and their transformations of American society for 132 years,. In more than 1,000 branches across the country, AAUW members work to break through barriers for women and girls. AAUW's member-adopted Public Policy Principles opposes "all forms of discrimination" and supports the "constitutional protection for the civil rights of all individuals." It also supports "freedom in the definition of family and guarantee of civil rights in all family structures." AAUW has an established record of opposing the Defense of Marriage Act, which forbids same-sex couples from receiving federal marriage benefit, and is a strong advocate for marriage equality. AAUW members in several states have endorsed and promoted marriage equality ballot initiatives, and opposed Proposition 8 when it came to a vote in 2008.

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 77 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 **ACLU of Northern California** and the **ACLU of San Diego and Imperial Counties** are ACLU affiliates in California.

API Equality–Northern California ("APIENC") is a grassroots community-based organization working at the intersections of the Asian Pacific Islander ("API") and Lesbian, Gay, Bisexual, Trans, and Queer/Questioning ("LGBTQ") communities of Northern California to reduce prejudice and oppression between and amongst community members and organizations. API Equality–Northern California is dedicated to empowering community members, advancing civil rights protections, and promoting respect and understanding for cultural and community diversity.

Asian American Institute ("AAI") is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. 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 is deeply concerned about the discrimination and exclusion faced by Asian Americans and other marginalized groups, including lesbian, gay, and bisexual members of the Asian American community. Accordingly, AAI has a strong interest in this case.

Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization in Washington, D.C. whose mission is to advance the civil and human rights of Asian

Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including anti-discrimination. AAJC is committed to challenging barriers to equality for all sectors of our society and has supported same-sex marriage rights in numerous amicus briefs.

The **Asian & Pacific Islander American Health Forum** ("APIAHF"), headquartered in San Francisco, California, is a national health justice organization which influences policy, mobilizes communities, and strengthens programs and organizations to improve the health and well-being of more than 18 million Asian Americans, Native Hawaiians, and Pacific Islanders living in the United States and its jurisdictions. We believe that no individual or family should be subject to discriminatory treatment, and that the ability to marry is a crucial aspect to achieving health equity and justice for our communities.

The **Asian Law Caucus**, founded in 1972, is the country's oldest civil rights and public interest legal organization dedicated to serving Asian and Pacific Islanders 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 and in advancing the integrity of the core constitutional principle of equal protection under the law to all Americans.

The **Boston Bar Association** ("BBA") traces its origins to meetings convened by John Adams in 1761,

thirty-six years before he became United States President. The BBA works to advance the highest standards of excellence for the legal profession, to serve the community at large, and to advocate for access to justice, including the right of all persons to equality under law.

The **Center for American Progress** is an independent nonpartisan educational institute dedicated to improving the lives of Americans through progressive ideas and action. Building on the achievements of progressive pioneers such as Teddy Roosevelt and Martin Luther King, our work addresses 21st-century challenges such as energy, national security, economic growth and opportunity, immigration, education, and health care. We develop new policy ideas, critique the policy that stems from conservative values, challenge the media to cover the issues that truly matter, and shape the national debate.

The **Charles Houston Bar Association** is the oldest and largest African American bar association in the San Francisco Bay Area. The mission of the Association is to improve access to justice; to promote equal protection under the law; to be proactive in increasing diversity within the legal community and to the bench; and to bring services to the community.

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

The **Courage Campaign** ("Courage") is a leading multi-issue advocacy organization working to bring progressive change to California and full equality to America's lesbian, gay, bisexual and transgender citizens and families. Courage empowers more than 750,000 grassroots and netroots activists. Courage Campaign Institute ("the Institute") is an affiliated organization of the Courage Campaign. Through a variety of groundbreaking public education campaigns, the Institute has played an integral role in keeping the public informed about *Hollingsworth* v. *Perry*, legal challenges to the so-called Defense of Marriage Act, and other LGBT equality cases.

Empire Justice Center is a statewide, not-for-profit public interest law firm in New York with offices in Rochester, Albany, White Plains, and Central Islip. Established in 1973, Empire Justice Center's mission is to protect and strengthen the legal rights of people in New York State who are poor, disabled or disenfranchised through systems change advocacy, direct representation, as well as training and support to other advocates and organizations in

a range of substantive law areas. Since our founding, Empire Justice Center has worked to oppose discrimination and challenge barriers to equality, including barriers based upon sexual orientation or gender identity.

Empire State Pride Agenda ("ESPA") is New York's statewide lesbian, gay, bisexual and transgender ("LGBT") civil rights and advocacy group. ESPA is committed to winning equality and justice for LGBT New Yorkers and their families. ESPA has been involved with advancing legislation securing equitable rights for all New Yorkers, and was a driving force behind New York State's enactment of marriage equality in 2011. ESPA also has participated as amicus curiae in litigation involving marriage equality.

Equal Rights Washington works to promote dignity, safety, and equality for LGBT Washingtonians. We have been one of the lead organizations working to achieve the freedom to marry in Washington State, and we continues to work on LGBT civil rights issues including making sure that couples who are legal married can access the federal rights and responsibilities of civil marriage.

EqualityMaine is the oldest and largest organization in Maine that advocates for LGBT rights and equality. EqualityMaine has participated as amicus curiae in litigation in support of marriage equality and was one of the primary supporters of the effort to authorize marriage licensing for same-sex couples in Maine.

Equality Maryland is the largest LGBT rights group in Maryland. Equality Maryland helped

introduce and was instrumental in obtaining passage of the Maryland Civil Marriage Protection Act in 2012. Equality Maryland also has participated as amicus curiae in litigation in support of marriage equality.

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

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

The **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 **League of United Latin American Citizens** ("LULAC") is the nation's largest and oldest civil rights volunteer-based organization that empowers Hispanic Americans and builds strong Latino

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

The **Legal Aid Society** is a private, not-for-profit legal services organization, the oldest and largest in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. It is dedicated to one simple but powerful belief: that no New Yorker should be denied access to justice because of poverty. With a commitment to equal justice for all and eliminating discrimination on the basis of numerous classifications including sexual orientation and gender identity, the Society handles 300,000 individual cases and matters annually and

provides a comprehensive range of legal services in three areas: the Civil, Criminal and Juvenile Rights Practices. In recognition that its LGBT clients are living at disproportionately higher poverty rates and are more likely to be dependent on public benefit programs, the Society is an outspoken advocate committed to removing barriers to equality for these persons.

The **Lesbian, Gay, Bisexual & Transgender Community Center in New York City** ("LGBT Community Center"), is the largest LGBT multi-service organization on the East Coast and the second largest LGBT community center in the country, offering many programs for the LGBT community, including Center Families. More than 2,500 families in the tri-state area participate in the Center Families program, which promotes the legitimacy and visibility of LGBT families. Consistent with its mission of supporting these families, the LGBT Community Center joins in this brief due to its strong belief that same-sex couples must have equal access to marriage and the same protections, rights, benefits and responsibilities afforded to heterosexual married couples in this country.

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

the expertise and advancement of LGBT legal professionals.

The **Massachusetts LGBTQ Bar Association** is a statewide professional association of LGBT and queer lawyers and allies providing a visible LGBTQ presence within the Massachusetts legal community.

MassEquality, founded in 2001 to promote and protect marriage equality in the first state to end marriage discrimination, is today the leading statewide grassroots advocacy organization in Massachusetts working to ensure that everyone across Massachusetts can thrive from cradle to grave without discrimination and oppression based on sexual orientation, gender identity, or gender expression. MassEquality works to achieve full equality for lesbian, gay, bisexual, transgender and queer people in all spheres of society through advocacy in the legislature and executive branches and through public education.

The **Mattachine Society of Washington, D.C.** is a non-profit, non-partisan research and educational society whose members support its original archival research. The mission of The Mattachine Society is to uncover the often-deleted pasts of LGBT Americans who faced persecution and discrimination by the federal government. Such persecution and discrimination often resulted in the loss of jobs and ruination of careers of gay and lesbian citizens simply because of their sexual orientation which rendered them "mentally ill" or a "security risk." The original Mattachine Society of Washington, D.C. founded in 1961, by Dr. Franklin Kameny, was the first gay civil rights organization in Washington, D.C. The current Mattachine Society is proud to continue this work with renewed passion and commitment.

The **Mexican American Legal Defense and Educational Fund** ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure the civil rights of Latinos living in the United States through litigation, advocacy, and education. MALDEF defends the rights of all Latino families, including those headed by lesbian or gay Latinos as well as Latino children who are disadvantaged because their same-sex parents are denied full recognition under the law.

The **National Association for the Advancement of Colored People** ("NAACP") is the country's largest and oldest civil rights organization. Founded in 1909, The NAACP is a New York not-for-profit corporation. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, and to eliminate racial hatred and racial discrimination. In fulfilling its mission, the NAACP has filed numerous amicus briefs on behalf of litigants in civil rights litigation in federal and state courts across the country.

The **NAACP Legal Defense and Educational Fund, Inc.** ("LDF") is a non-profit legal organization that for more than seven decades has fought to enforce the guarantees of the United States Constitution against discrimination. *See, e.g., Brown* v. *Bd. of Educ.,* 347 U.S. 483 (1954); *McLaurin* v. *Okla. State Regents for Higher Educ.,* 339 U.S. 637 (1950); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Sipuel* v. *Bd. of Regents of Univ. of Okla.,* 332 U.S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938). LDF has sought to eradicate barriers to the full and equal enjoyment of social and political rights, including in the context of partner or spousal

relationships, *see, e.g., McLaughlin* v. *Florida,* 379 U.S. 184 (1964), and has participated as amicus curiae in cases across the nation that affect the rights of gay people, including *Romer* v. *Evans,* 517 U.S. 620 (1996); *Perry* v. *Schwarzenegger,* 591 F.3d 1147 (9th Cir. 2010); *Strauss* v. *Horton,* 207 P.3d 48 (Cal. 2009); *In re Marriage Cases,* 183 P.3d 384 (Cal. 2008); *Conaway* v. *Deane,* 932 A.2d 571 (Md. 2007); and *Hernandez* v. *Robles,* 855 N.E.2d 1 (N.Y. 2006).

National Action Network ("NAN") is one of the leading civil rights organizations in the nation, with chapters throughout the United States. Founded in 1991 by Reverend Al Sharpton, NAN works within the spirit and tradition of Dr. Martin Luther King, Jr. to promote a modern civil rights agenda that includes the fight for one standard of justice, decency and equal opportunities for all people. That effort is incomplete without working to ensure the equality of opportunities and treatment for the LGBT community. So long as one group is denied equal treatment under the law, the nation falls short of guaranteeing the right of all persons to life, liberty and the pursuit of happiness.

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

The **National Council of La Raza** ("NCLR")—the largest national Hispanic civil rights and advocacy

organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas—assets/investments, civil rights/immigration, education, employment and economic status, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families. Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization headquartered in Washington, DC, serving all Hispanic subgroups in all regions of the country. It has regional offices in Chicago, Los Angeles, New York, Phoenix, and San Antonio and state operations throughout the nation.

The **National Gay and Lesbian Task Force Foundation** (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 LGBT Bar Association** ("LGBT Bar") is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students and affiliated lesbian, gay, bisexual and transgender legal organizations. The LGBT Bar promotes justice in and through the legal profession for the LGBT community in all its

diversity. This case stands to impact our membership both professionally and personally. A ruling in favor of marriage equality would greatly increase our attorneys' ability to protect their clients' best interests and to safeguard the families and relationships they have formed in their own lives. Recently, we were privileged to see 30 of our openly-LGBT members inducted into the Supreme Court Bar, joining in the same time-honored, formal process with attorneys from all over the United States. Increasing inclusion in cherished civil institutions is one of the most storied arcs in the history of our nation, and we believe that marriage equality is a profound step in the right direction towards equitable treatment under the law for all citizens.

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

The **New York Legal Assistance Group** ("NYLAG"), founded in 1990, is a not-for-profit organization dedicated to providing free civil legal services to New York's low-income individuals and families. The LGBT Law Project of NYLAG provides free legal consultations and legal representation to low-income LGBT community members in areas such as child custody, visitation, divorce and dissolution, second-parent adoption, legal name change, employment discrimination and immigration. The LGBT Project recognizes and addresses the unique

legal needs in the LGBT communities and provides culturally competent services.

The **New York State Bar Association** ("NYSBA") was founded in 1876, and is the largest voluntary bar association in the United States, with over 76,000 members. NYSBA serves the profession and the public by, inter alia, promoting reform in the law and facilitating the administration of justice. NYSBA has long supported marriage equality for same-sex couples. In 2009, NYSBA passed a resolution supporting same-sex marriage; and in 2010 the NYSBA was a lead sponsor of the American Bar Association's resolution in support of same-sex marriage. The NYSBA supports allowing same-sex couples to marry and recognizing marriages if contracted elsewhere as the Association believes only marriage can grant full equality to same-sex couples and their families.

OCA – Asian Pacific American Advocates, a national membership driven organization dedicated to advancing the social, political and economic well-being of Asian Pacific Americans, consistent with its national resolution passed in 2007, denounces discriminatory policies and practices based on sexual orientation. We ardently support policies that uphold the importance of familial relationships without limitation based on race, religion, ethnicity, gender, or sexual orientation as a fundamental human right.

One Iowa supports full equality for LGBT individuals living in Iowa through grassroots efforts and education. As the largest LGBT organization in Iowa, we are honored to sign on to both cases.

Out & Equal Workplace Advocates is a non-profit, national organization headquartered in San Francisco that addresses LGBT issues in the workplace.

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

Public Advocates Inc. is a California-based civil rights law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories. Since our founding in 1971, we have engaged in a wide range of cutting edge civil rights issues from school finance, urban development, transportation policy, and climate justice, to language access, employment discrimination, and health services disparities. The issues of this case are strongly aligned with Public Advocates' mission to fight discrimination and advance equal opportunity for marginalized populations.

The **Rainbow PUSH Coalition** supports marriage equality. All people deserve equal protection under the law. We believe in human rights for all human beings. We must measure human rights by one yardstick. That principle resides in the moral center and still applies—everything flows from this position. We seek to

uphold the principles of due process, of equal protection under the law, of fighting against discrimination against any and all people based on race, religion, gender or sexual orientation. Discrimination against one group of people is discrimination against all of us. The State—and the courts—should not sanction discrimination. No group of people should be denied their fundamental constitutional liberties, like equal protection under the law, simply because of who they are. Keep Hope Alive.

Secular Woman is a non-profit organization whose mission is to amplify the voice, presence, and influence of non-religious women. The Family & Relationship Values of Secular Woman are: (1) we hold that each person has the right to seek happiness through consensual relationships that enhance their lives. We support full marriage equality nationwide and (2) we embrace diverse concepts of family and parenthood. Love and security come in many forms.

The **South Asian Bar Association of Connecticut** ("SABAC") was formed in 2003 to serve as a resource to South Asian lawyers and law students for mentoring, networking, advocacy and education, and community outreach. SABAC is a member organization of the North American South Asian Bar Association ("NASABA") and has played an active role in the formation of NASABA. SABAC members include attorneys who practice in a wide variety of organizations including law firms, corporate legal departments, non-profit organizations, government, and academic institutions. SABAC and its members have particular interest in cases where the rights of

minorities to receive equal and fair treatment under the laws of the United States are at issue.

The **Vermont Freedom to Marry Task Force** is Vermont's educational resource on all issues related to marriage equality. We are an advocacy organization calling for the end of discriminatory laws such as the Defense of Marriage Act that prohibit federal recognition of the legal marriages of same-sex couples in Vermont and deny same-sex couples and their families the full protections and responsibilities of civil marriage.

Women's Bar Association of the State of New York ("WBASNY") is a statewide not-for-profit organization of attorneys, with eighteen chapters and more than 3,600 members. WBASNY is dedicated to fair and equal administration of justice and has been a vanguard for the rights of women, same-sex couples, and LGBT persons. It has participated as an amicus in numerous cases supporting equal rights under the law for all persons, regardless of sexual orientation.

* The Leadership Conference's participating members include:

A. Philip Randolph Institute

AARP

Advancement Project

African Methodist Episcopal Church

Alaska Federation of Natives

Alliance for Retired Americans

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American-Arab Anti-Discrimination Committee

American Association for Affirmative Action

American Association of People with Disabilities

AAUW

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

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federation of Government Employees

American Federation of Labor-Congress of Industrial Organizations

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

American Federation of Teachers, AFL-CIO

American Friends Service Committee

American Islamic Congress (AIC)

American Jewish Committee

American Nurses Association

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Amnesty International USA

Anti-Defamation League

Appleseed

Asian American Justice Center

Asian Pacific American Labor Alliance

Association for Education and Rehabilitation of the Blind and Visually Impaired

B'nai B'rith International

Brennan Center for Justice at New York University School of Law

Building & Construction Trades Department, AFL-CIO

Center for Community Change

Center for Responsible Lending

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Church Women United

Coalition of Black Trade Unionists

Common Cause

Communications Workers of America

Community Action Partnership

Community Transportation Association of America

Compassion & Choices

DC Vote

Delta Sigma Theta Sorority

DEMOS: A Network for Ideas & Action

Disability Rights Education and Defense Fund

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

Epilepsy Foundation of America

Episcopal Church-Public Affairs Office

Equal Justice Society

Evangelical Lutheran Church in America

FairVote: The Center for Voting and Democracy

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

Gay, Lesbian and Straight Education Network (GLSEN)

General Board of Church & Society of the United Methodist Church

Global Rights: Partners for Justice

GMP International Union

Hip Hop Caucus

Human Rights Campaign

Human Rights First

Immigration Equality

Improved Benevolent & Protective Order of Elks of the World

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Council for Public Affairs

Jewish Labor Committee

Jewish Women International

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Laborers' International Union of North America

Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens

League of Women Voters of the United States

Legal Aid Society – Employment Law Center

Legal Momentum

Mashantucket Pequot Tribal Nation

Matthew Shepard Foundation

Mexican American Legal Defense and Educational Fund

Na'Amat USA

NAACP

NAACP Legal Defense and Educational Fund, Inc.

NALEO Educational Fund

National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education

National Association of Colored Women's Clubs, Inc.

National Association of Community Health Centers

National Association of Consumer Advocates (NACA)

National Association of Human Rights Workers

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

National Association of Neighborhoods

National Association of Social Workers

9 to 5 National Association of Working Women

National Bar Association

National Black Caucus of State Legislators

National Black Justice Coalition

National CAPACD – National Coalition For Asian Pacific American Community Development

National Center for Transgender Equality

National Center on Time & Learning

National Coalition for the Homeless

National Coalition on Black Civic Participation

National Coalition to Abolish the Death Penalty

National Committee on Pay Equity

National Community Reinvestment Coalition

National Conference of Black Mayors, Inc.

National Congress for Puerto Rican Rights

National Congress of American Indians

National Consumer Law Center

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

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Disability Rights Network

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Filipino American Associations

National Gay & Lesbian Task Force

National Health Law Program

National Hispanic Media Coalition

National Immigration Forum

National Immigration Law Center

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

National Latina Institute for Reproductive Health

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Organization for Women

National Partnership for Women & Families

National Senior Citizens Law Center

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

National Women's Political Caucus

Native American Rights Fund

Newspaper Guild

OCA (formerly known as Organization of Chinese Americans)

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

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

ORT America
OutServe-SLDN
Paralyzed Veterans of America
Parents, Families, Friends of Lesbians and Gays
People for the American Way
Phi Beta Sigma Fraternity, Inc.
Planned Parenthood Federation of America, Inc.
PolicyLink
Poverty & Race Research Action Council (PRRAC)
Presbyterian Church (USA)
Pride at Work
Progressive National Baptist Convention
Project Vote
Public Advocates
Religious Action Center of Reform Judaism
Retail Wholesale & Department Store Union, AFL-CIO
SAALT (South Asian Americans Leading Together)
Secular Coalition for America
Service Employees International Union
Sierra Club
Sigma Gamma Rho Sorority, Inc.
Sikh American Legal Defense and Education Fund
Sikh Coalition
Southeast Asia Resource Action Center (SEARAC)
Southern Christian Leadership Conference
Southern Poverty Law Center
Teach For America

The Association of Junior Leagues International, Inc

The Association of University Centers on Disabilities

The National Conference for Community and Justice

The National PTA

TransAfrica Forum

Union for Reform Judaism

Unitarian Universalist Association

UNITE HERE!

United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries

United Farm Workers of America (UFW)

United Food and Commercial Workers International Union

United Mine Workers of America

United States International Council on Disabilities

United States Students Association

United Steelworkers of America

United Synagogue of Conservative Judaism

Women of Reform Judaism

Workers Defense League

Workmen's Circle

YMCA of the USA, National Board

YWCA USA

Zeta Phi Beta Sorority, Inc.