No. 12-307

IN THE
# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner*,

*v.*

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, ET AL.,
*Respondents*.

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

## BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENT WINDSOR (Equal Protection Guarantee)


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## INTEREST OF AMICUS[1]

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).

Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the fair application of the Fifth and Fourteenth Amendments to the United States Constitution, which provide important protections for all Americans, and submits

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties.

that its experience and knowledge will assist the Court in this case.

## SUMMARY OF THE ARGUMENT

To safeguard our Constitution's guarantee of equal protection, it is well-settled that courts should apply a more rigorous standard of review to government classifications that categorically exclude individuals from equal participation in our country's social and political community based solely on their status as members of a certain group. In determining the type of group-based classifications that trigger such "heightened scrutiny," this Court has focused on the need to guard against government action that intentionally relegates individual members of historically subordinated groups to an inferior social status. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 9 (1967). It is for that reason that the government bears a "heavy burden" in justifying such laws. *See id.*

Over time, this Court has expanded the application of heightened scrutiny to various groups for different reasons. In addition to classifications based on race, *see id.* at 11, the Court has applied heightened scrutiny to laws that discriminate on the basis of, among other things, national origin, *see Oyama v. California*, 332 U.S. 633, 646 (1948), and sex, *see United States v. Virginia* (*VMI*), 518 U.S. 515 (1996). This expansion of heightened scrutiny has been essential to our forward progress as a nation in eliminating entrenched discrimination. In an analogous context, Justice Kennedy has written:

> Our Nation from the inception has sought to preserve and expand the

> promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.

*Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment). This case provides an important opportunity to continue our nation's tradition of rooting out injustices that inhibit equal opportunity for all Americans.

Expansion of heightened scrutiny has always involved a careful and deliberative analysis that focuses at least in part on whether the particular classification is predicated upon "social stereotypes," *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976), and/or "create[s] or perpetuate[s] the legal, social, and economic inferiority" of a group that has been subjected to sustained discrimination, *VMI*, 518 U.S. at 534. This rationale for heightened scrutiny has become known as the "antisubordination" principle.[2]

LDF writes separately in this case for two reasons. First, LDF wishes to emphasize that this antisubordination principle—which has always provided a critical justification for the role that heightened scrutiny plays in enforcing the Constitution's guarantee of equal protection—should apply with the

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[2] *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2004).

same force against laws that unquestionably subordinate gays and lesbians, including the Defense of Marriage Act (DOMA). *See* Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7). This federal statute was explicitly fashioned to ensure that legally married gay and lesbian couples would not be afforded the same status and benefits of federal law as heterosexual married couples.

Second, LDF writes separately to underscore that the judiciary has a distinctive role to play in rooting out the pernicious stereotypes that motivate laws like DOMA. Of course, all government actors contribute to the vindication of the Constitution's equal protection guarantee. Yet, contrary to the claim of DOMA's proponents that application of heightened scrutiny in the circumstances at issue here would overstep the role of the courts, equal protection law endows the judicial branch with a special responsibility to safeguard historically subordinated groups, including gays and lesbians, whom the majoritarian political processes are often unwilling or unable to protect against constitutional violations.

## ARGUMENT

### I. An essential function of equal protection law is to guard against government action that subordinates historically marginalized groups.

A seminal role of equal protection law is to guard against government action that promotes or reinforces social hierarchy to the specific disadvantage of groups that have long been the subject of discrimination. The Court's focus on government action that

perpetuates subordination is most apparent in early equal protection cases leading up to and following *Brown v. Board of Education*, 347 U.S. 483 (1954). These cases rejected state laws that subordinated African Americans as a class based on their presumed "inferiority."[3]

### A. The antisubordination principle developed as a tool to expose and invalidate the legacy of America's racial caste system.

In the years before *Brown*, LDF successfully brought a series of higher education cases to dismantle the "separate but equal" doctrine, established under *Plessy v. Ferguson*, 163 U.S. 537 (1896), which consigned African Americans, by law, to an inferior social position. *See, e.g.*, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (per curiam); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). In *Sweatt v. Painter*, for example, this Court in 1950 mandated that the University of Texas Law School (UT) admit Heman Sweatt, who had been rejected based solely on his "Negro" status and instead offered admission to a separate law school that Texas had created for African Americans. 339 U.S. 629, 631-32 (1950). The

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[3] The Court's more recent cases that apply heightened scrutiny do not negate this core animating principle of equal protection law. Indeed, the Court has concluded that certain government classifications should be subject to heightened scrutiny because of a concern that those classifications both reflect and reinforce social stereotypes. *See VMI*, 518 U.S. at 541 (reviewing courts should take a "hard look" at overbroad generalizations that are likely to perpetuate discrimination).

Court rejected UT's argument that the education offered Sweatt at the newly-created segregated black school was "substantially equal." *Id.* at 634. It reasoned that Sweatt's exclusion from UT denied him the "standing in the community, traditions and prestige" that were customarily accorded white students who graduated from UT. *Id.* at 634. As *Sweatt* illustrates, the Court's unmooring of the "separate but equal" doctrine reflected its evolving view that separate could never truly be equal because this doctrine was simply a state-sponsored subterfuge that had both the purpose and effect of creating and entrenching a racial caste system.

The Court's reasoning in *Sweatt*—taken together with the unmistakable impact of racial segregation on the lives of school children and indeed on the nation—crystallized fully in *Brown*. Perhaps more than any other case, *Brown* points to the role that equal protection law has played in rooting out government action that relegates historically marginalized groups to an inferior social status. Rejecting the systemic subordination of African-American children in public education under the doctrine of "separate but equal," the Court concluded that forced racial separation by law "denot[es] the inferiority of the negro group" and "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown*, 347 U.S. at 494 (internal quotation marks omitted). The Court's condemnation of both *de jure* segregation and the notion that "separate" could ever be "equal" cemented its rejection of laws that purposefully perpetuated racial subordination.

The Court also articulated this view of equal protection outside of the education context. In *Strauder v. West Virginia*, the Court struck down a state law that limited jury service to certain "white male" citizens. 100 U.S. 303, 305, 310 (1880); *see also Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that jury commissioners unconstitutionally excluded persons of Mexican descent from jury service). The *Strauder* Court objected to the law on the grounds that its purpose was to "single[] out and expressly den[y] [African Americans] by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified." 100 U.S. at 308. In its categorical exclusion of African Americans from jury service, the state law "affixed . . . an assertion of their inferiority, and [served as] a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.* The Court focused on the demeaning and stigmatizing aspects of the law, which functioned "practically [as] a brand upon [African Americans]" and, in so doing, codified their subordinate status. *Id.*

The Court similarly applied this antisubordination principle to laws that discriminated against interracial couples. In *McLaughlin v. Florida*, the Court applied heightened scrutiny to strike down a state law that penalized the cohabitation of interracial couples, concluding that racial classifications that were designed to "single[] out the promiscuous interracial couple for special statutory treatment" were constitutionally impermissible. 379 U.S. 184,

196 (1964). The Court further observed that such laws "bear a far heavier burden of justification," *id.* at 194, and indicated its presumptive suspicion of "invidious" distinctions that "'select[] a particular race or nationality for oppressive treatment.'" *Id.* (quoting *Skinner v. Oklahoma ex rel. Williamson*, 318 U.S. 535, 541 (1942)). While not stating so explicitly, the Court's analysis reflected its underlying concern that the criminal penalty against interracial cohabitation furthered a system in which African Americans—and anyone who associated with them—were deemed to be socially inferior.

*Loving v. Virginia*, which followed *McLaughlin*, also illustrates this point. In *Loving*, the Court struck down Virginia's "comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages." 388 U.S. at 4. Virginia argued that the Court should "defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages" based on rational basis review. *Id.* at 8.

Importantly, this Court rejected that argument in *Loving*, finding that the apparent purpose of the statute was to "maintain White Supremacy." *Id.* at 11. As in its earlier decisions, the Court's analysis reflected its underlying concern with state measures that create and/or entrench the social subordination of groups that have been the subject of persistent discrimination. Rejecting Virginia's argument that the judgment of its legislature was owed deference, the Court concluded that Virginia failed to satisfy its "very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9.

*Loving*, like *Strauder*, *Sweatt*, *Brown*, and *McLaughlin*, illustrates this Court's repudiation under equal protection law of measures that are intended to foster a social hierarchy to the disadvantage of historically marginalized groups. Although equal protection law has evolved over time, the antisubordination principle remains at its core. *Cf. VMI*, 518 U.S. at 534 (observing that classifications may be appropriate to compensate women for past economic suffering but "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women" (citation omitted)); *Califano v. Webster*, 430 U.S. 313, 320 (1977) (approving of differing treatment of men and women "to compensate for particular economic disabilities suffered by women," but not when such treatment results from "'a traditional way of thinking about females'" (citation omitted)).[4]

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[4] Two amicus briefs filed in defense of DOMA's constitutionality contend that the states alone, and not the federal government, are subject to the Constitution's equal protection guarantee. S*ee* Amicus Br. of Foundation for Moral Law 7-13, Amicus Br. of Citizens United's National Committee for Family, Faith and Prayer et al. 13-15. Yet this Court has long held otherwise. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); U.S. Merits Br. 16. On the same day that the Court issued its landmark opinion in *Brown*, striking down state-sponsored racial segregation in public schools, 347 U.S. 483, it also invalidated similar policies endorsed by the federal government for the District of Columbia public schools, on the ground that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on the states. *Bolling*, 347 U.S. at 500. The Court thereafter has reaffirmed repeatedly the principle that the federal government is subject to the same antidiscrimination and antisubordination obligations that the Constitution imposes upon states. *See, e.g.*,

### B. The antisubordination principle helped to cabin the expansion of heightened scrutiny.

As this Court has aptly noted, "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." *Hernandez*, 347 U.S. at 478; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that the role of the courts is to safeguard "discrete and insular minorities" against discrimination by state actors). That is why heightened scrutiny has expanded over time to include other classifications that burden socially stigmatized groups.

Of course, the nature of discrimination against gays and lesbians differs fundamentally from *de jure* racial segregation, just as racial discrimination differs from discrimination based on sex and other suspect classifications to which heightened scrutiny applies. But DOMA and other laws that purposefully infringe on the rights of gay people are analogous to the racial caste system effectuated under "separate but equal" in an important respect: they create and perpetuate a social hierarchy that is premised on the superiority of one group over another.

By virtually any measure, gays and lesbians have been subjected to systemic discrimination throughout our nation's history, resulting in their ongoing

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*United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (plurality opinion) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth."); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

subordination as a class. And DOMA's express purpose is to create and perpetuate a hierarchy that disadvantages gay people based on their sexual orientation. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 298-99 (D. Conn. 2012); Letter from Eric H. Holder, Jr., Attorney General, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) (J.A. 190) [hereinafter Holder Letter] ("[T]he legislative record underlying DOMA's passage . . . contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.").

Section 3 of DOMA defines "marriage" as a "legal union between one man and one woman," and it defines "spouse" as "a person of the opposite sex who is a husband or a wife" for the purpose of all federal laws and regulations. 1 U.S.C. § 7. DOMA, therefore, expressly denies marital benefits under federal law to gays and lesbians who are legally married under state law, while extending these same benefits to married heterosexual couples. *See id.* By categorically excluding gay people from "more than a thousand" federal protections and obligations that come with marriage, *see* U.S. Supp. Br. App. 13a, U.S. Merits Br. 17, DOMA treats gays and lesbians as legally and socially inferior. *Cf. Romer v. Evans*, 517 U.S. 620, 631 (1996) ("Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless

number of transactions and endeavors that constitute ordinary civic life in a free society.").

This exclusion is premised on stereotypes regarding the fitness of gay and lesbian partnerships, *see, e.g.*, Amicus Br. of Liberty Counsel 35-41, and moral condemnation of gay people more generally. For these reasons, DOMA is both stigmatizing and demeaning and perpetuates the historical discrimination that gay people have long suffered as a group. *Cf. Lawrence v. Texas*, 539 U.S. 558, 575-76 (2003) (observing dignity harms of state law that targets same-sex sodomy but not sodomy between people of different sexes). This scheme, like any other that demeans and denigrates an entire class of people, should be subject to heightened scrutiny, not rational basis, as the Court of Appeals correctly concluded.[5] U.S. Merits Br. 21 & n.4.

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[5] The Court of Appeals faithfully applied this Court's standard test for determining whether heightened scrutiny should apply to gays and lesbians. *See* U.S. Supp. Br. App. 15a-23a; U.S. Merits Br. 21; Windsor Merits Br. 18-31. "[T]here is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today." Holder Letter (J.A. 185); *see* U.S. Merits Br. 22-27. DOMA is but one of numerous laws that disadvantage gays and lesbians. Gays and lesbians also lack federal protection from discrimination in employment, housing, and public accommodations. In more than half of the states, gay and lesbian people lack any legal protection from discrimination in private sector employment (29 states), housing (30 states), and public accommodations (29 states). (Chauncey Aff., J.A. 376; Segura Aff., J.A. 405.) Despite these political realities, other courts have concluded that the success of gay rights advocates in securing the passage of antidiscrimination legislation in some jurisdictions bars a finding of political powerless-

DOMA's denial of marital benefits under federal law to gays and lesbians subordinates them within the institution of marriage. And like early laws that were designed to oppress African Americans, DOMA relegates gays and lesbians to an unequal and inferior status as a group. This is contrary to the core purpose of equal protection.

## II. The role of the courts is to safeguard the rights of historically subordinated groups by applying heightened scrutiny to laws, like DOMA, that disadvantage them as a class.

Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) and several of its amici argue that application of heightened scrutiny to laws that discriminate against gays and lesbians subverts the democratic process by "tak[ing] issues away from" voters. BLAG Br. 22; *see also* Amicus Br. of Liberty, Life and Law Foundation et al. 2, 22; Amicus Br. of National Association of Evangelicals et al. 3, 7, 14. But the Consti-

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ness and, thus, application of strict scrutiny, *see Conaway v. Deane*, 932 A.2d 571, 611-12 (Md. 2007); *Anderson v. King Cnty.*, 138 P.3d 963, 974-75 (Wash. 2006) (en banc). This is illogical. "It hardly follows that a group is politically 'powerful' because it has achieved some success in securing legal remedies against some formal and informal discrimination that has long burdened the group." Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363, 1393 (2011). Any meaningful analysis of political power must consider the history of discrimination that led to the need for antidiscrimination legislation in the first place, as the Court of Appeals correctly concluded. *See* U.S. Supp. Br. App. 22a (citing *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (plurality opinion)).

tution's guarantee of equal protection locates *in the judiciary* a special responsibility of prodding society to reexamine assumptions that are rooted in animus, bigotry, and social stereotypes that in turn entrench social caste. *See Carolene Prods.*, 304 U.S. at 152 n.4. While all branches of government have a role to play in ensuring the equal protection of the laws, the judiciary is best situated to protect subordinated groups whose rights are not always protected by majoritarian political processes. *See Nixon v. Condon*, 286 U.S. 73, 89 (1932) ("[Equal protection] lays a duty upon the court to level by its judgment these barriers . . . .").

The passage of DOMA illustrates well the need for more searching judicial review. DOMA was enacted in large measure in response to the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which suggested that the state's ban on same-sex marriage likely violated the equal rights amendment to the Hawaii Constitution, *id.* at 67. H.R. Rep. No. 104-664, at 2 (1996). Congress's sweeping response, made explicit in the legislative record, puts gays and lesbians who choose to marry on a separate, unequal, and lesser footing than married heterosexuals and, therefore, subordinates gay people as a class. *Cf. Plessy*, 163 U.S. at 559-60 (Harlan, J., dissenting).

First, by denying federal benefits to legally married gay and lesbian couples, which are granted to otherwise similarly situated heterosexual couples, DOMA codifies a social hierarchy based on sexual orientation that has destructive social and economic consequences. Second, DOMA promotes harmful and inaccurate stereotypes of gays and lesbians as

immoral and as unfit parents in ways that reinforce their status as a lesser class. *Cf. Frontiero*, 411 U.S. at 686-87 (statutory distinctions between the sexes can "have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members"); *Loving*, 388 U.S. at 11 (concluding that purpose of antimiscegenation law is to maintain "White Supremacy"); *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting) (noting that the "real meaning" of the law requiring racial segregation in public transportation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens").

In every sense, DOMA demeans and stigmatizes gays and lesbians generally and consigns married gay men and lesbians in particular, by operation of law, to an inferior status. Consistent with the core function of equal protection law, the application of heightened scrutiny to DOMA is crucial.[6]

The application of heightened scrutiny to degrading and oppressive laws has been instrumental in pushing past discriminatory barriers of all kinds by signaling that such laws should have no place in our society. More searching judicial review is critical to advancement of civil rights for all, and to our progress as a nation.

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[6] To be clear, DOMA could not pass constitutional muster even under a more relaxed standard of review. *See* Windsor Merits Br. 32-59.

## CONCLUSION

For the foregoing reasons, as well as those outlined by the United States and Respondent Edith Schlain Windsor, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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