12-2335 (L)

No. 12-2435 (Con)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDITH SCHLAIN WINDSOR, In her Official capacity as
Executor of the estate of Thea Clara Spyer,
Plaintiff-Appellee,

v.

BIPARTISAN LEGAL ADVISORY GROUP OF
THE UNITED STATES HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant,

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), amicus curiae NAACP Legal Defense and Educational Fund, Inc., through undersigned counsel, certifies that it is a non-profit corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated: September 7, 2012

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization established under New York law. For more than seven decades, LDF has fought to enforce the guarantees of the United States Constitution against discrimination. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *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.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *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. 2009); *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).

[1] This brief is filed with the consent of all parties. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for amicus states 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.

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

SUMMARY OF THE ARGUMENT

A critical function of heightened scrutiny under equal protection law is 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) (describing state's "heavy burden" in justifying law barring interracial marriage). Over time, courts have expanded the application of heightened scrutiny to various groups for different reasons. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976) (suggesting that "social stereotypes" about "'reckless' young men" informed adoption of law that limited ability of young males, but not their female counterparts, to purchase alcohol). But this anti-subordination function—which rejects classifications that "create or perpetuate the legal, social, and economic inferiority" of a group that has been subjected to sustained discrimination, *see United States v. Virginia*, 518 U.S. 515, 534 (1996) [hereinafter *VMI*]—lies at the heart of heightened scrutiny, and should apply with the same force against laws, such as the Defense of Marriage Act (DOMA), that unquestionably disadvantage gays and lesbians. The application of heightened

scrutiny has been essential to striking down government classifications that categorically exclude individuals, based on their status as members of a particular group, from equal participation in our country's social and political community and, accordingly, is essential to our forward progress as a nation. *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("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.").

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 courts' 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." *Strauder v. West*

Virginia pointedly articulated this view of equal protection, striking 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) (striking down state law that excluded persons of Mexican descent from jury service). The *Strauder* Court objected that the purpose of the law 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 Court observed that the state law "affixed . . . an assertion of their inferiority, and 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.*

In the years before *Brown v. Board of Education*, 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, the Supreme 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, notwithstanding that the state had created a separate law school specifically for African Americans. 339 U.S. 629, 631 (1950). Reasoning that Sweatt's exclusion from UT denied him the "standing in the community, traditions and prestige" that were customarily accorded white matriculants, *id.* at 634, the Court rejected UT's argument that the education offered Sweatt at the newly-created black school was "substantially equal." *Id.* This unmooring of "separate but equal" reflected the Court's evolving view that the doctrine was simply a subterfuge for a system 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 the segregation doctrine on the lives of school children, and indeed on the nation, crystallized fully in *Brown v. Board of Education*. 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 Supreme 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." 347 U.S. at 494. The Court's condemnation of *de jure* segregation and the notion that "separate" could ever be "equal" cemented its rejection of laws that purposefully perpetuated racial subordination.

Similarly, in *McLaughlin v. Florida*, the Court applied heightened scrutiny to strike down a state law that penalized the cohabitation of interracial couples. 379 U.S. 184 (1964). While the Court accepted as valid the state's interest in punishing "promiscuity," *id*. at 193, it concluded that racial classifications that were designed to "single[] out the promiscuous interracial couple for special statutory treatment," *id.* at 196, "bear a far heavier burden of justification," *id.* at 194, and indicated its presumptive suspicion of "invidious" laws that "'select[] a particular race or nationality for oppressive treatment,'" *id*. (citing *Gaines*, 305 U.S. 337; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). 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 and has particular relevance here. In *Loving*, the Supreme 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, the Court rejected that argument, 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. Contrary to the deference that the state urged its legislative judgment was owed, 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 the Supreme 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, this function lies at its core. *Cf. VMI*, 518 U.S. at 534 (holding 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" (internal citations omitted)); *Hernandez*, 347 U.S. at 478

("[C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection."); *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).

Of course, the nature of discrimination against gays and lesbians differs fundamentally from *de jure* racial segregation. 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. 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, relegates them to an unequal and inferior status as a group. This is contrary to the core purpose of equal protection.

II. DOMA, which relegates gays and lesbians to a subordinate social status, should be subject to heightened scrutiny.

By virtually any measure, gays and lesbians have been subjected to systemic discrimination throughout our nation's history, resulting in their ongoing 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 Personnel Mgmt.*, No. 3:10-cv-1750, 2012 WL 3113883, at

*1 (D. Conn. July 31, 2012). 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. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 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 the federal protections and obligations that come with marriage, DOMA treats gays and lesbians as legally and socially inferior. This exclusion—which is premised on stereotypes regarding the fitness of gay and lesbian partnerships, *see* Amicus Br. of American College of Pediatricians 4-10, and moral condemnation of gay people more generally—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.

To determine whether a particular classification should be subjected to heightened scrutiny, courts have considered the following four factors: "'(1) the

history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristics are "immutable" or beyond the class members' control; and (4) the political power of the subject class.'" *Pedersen*, 2012 WL 3113883, at *13 (quoting *Golinski v. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012)); Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Rep., at 2 (Feb. 23, 2011) [hereinafter Holder Letter] (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)). Any one of these factors, standing alone, indicates that the classification at issue is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).[2]

[2] A faithful application of the four-factor test to gays and lesbians reveals that laws which burden them as a group should be subject to heightened scrutiny. Courts have acknowledged a long history of discrimination against gays and lesbians. *See Pedersen*, 2012 WL 3113883, at *20 (listing cases in which Courts have recognized the history of discrimination against gays and lesbians in this country). As noted by Attorney General Eric H. Holder, Jr. in his letter setting forth the United States' decision to cease defending the constitutionality of DOMA and advocating for heightened scrutiny for classifications that burden gays and lesbians: "[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 at 2. And gays and lesbians as a class lack political power. Section 3 is but one of numerous laws that disadvantage gays and lesbians. Three-fifths of the

A. DOMA's clear purpose is to impose significant burdens on gays and lesbians who are legally married under state law.

DOMA does not just incidentally burden gays and lesbians; it was explicitly fashioned to ensure that legally married gay and lesbian couples would not be

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states have amended their constitutions to prohibit gay and lesbian people from marrying. (Segura Aff., JA-594.) Gays and lesbians also lack federal protection from discrimination in employment, housing, and public accommodations. In more than half of the 50 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., JA-557; Segura Aff., JA-591.) *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.").

Despite the political realities described above, courts have come to widely divergent conclusions in their assessment of the political power of gays and lesbians. While some courts have emphasized the lack of political strength that gays and lesbians possess to end discrimination through the traditional democratic process, *see, e.g.*, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 444 (Conn. 2008); *accord Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009), other courts have concluded that the success of gay rights advocates in securing the passage of antidiscrimination legislation bars a finding of political powerlessness, *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 latter conclusion 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. Under such an analysis there can be no question that gays and lesbians lack political power.

afforded the same status and benefits of federal law as heterosexual married couples.

As noted by the District Court, DOMA was passed 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 marriages likely violated the equal rights amendment to the Hawaii Constitution. H.R. Rep. No. 104-664, at 2 (1996) [hereinafter House Report]. The House Report on DOMA referred to the *Baehr* decision and described it as being part of an "orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers." *Id.* at 2-3. The House Report explicitly identified "defending traditional notions of morality" as one of four governmental interests advanced by DOMA: "Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.* at 12, 15-16. The House Report goes on to state that "civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children." *Id.* at 13.

This kind of targeted response, and its explicit legislative record, makes plain that Section 3 of DOMA was motivated by disapproval of gay and lesbian people and gay marriage, based primarily on the belief that gays and lesbians are immoral and on an inaccurate stereotype that they are unfit parents. This moral disapproval of gay and lesbian families, on which DOMA was overtly premised, is "precisely the kind of stereotype-based thinking" that cannot form the basis of our laws and which ought to receive a heightened degree of scrutiny from the court. *See* Holder Letter at 4 ("[T]he legislative record underlying DOMA's passage . . . contains numerous expressions containing 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 protect against."). Indeed, laws like DOMA that are based on and designed to perpetuate harmful stereotypes have historically been scrutinized closely by the courts in part because of the dangers that such stereotypes may entrench prejudice against groups that have been the target of persistent discrimination. *See VMI*, 518 U.S. at 533 (classifications based on sex "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (observing that through the operation of historical stereotyping "our statute books gradually became laden with gross, stereotyped distinctions between the sexes").

B. DOMA imposes significant burdens on gays and lesbians.

In defining marriage as between a man and a woman only, Section 3 affects "myriad federal laws and regulations" as applied to gay and lesbian people who are legally married under state law. *Pedersen*, 2012 WL 3113883, at *2; *see also* H.R. Rep. No. 104-664, at 10. The practical effects of this restricted federal definition of marriage are vast. The U.S. District Court for the District of Connecticut estimated that Section 3 affects "at least 1,138 federal laws and regulations and . . . deprive[s] an estimated 100,000 legally married same-sex couples of the benefits afforded to married couples under such federal laws and regulations." *Pedersen*, 2012 WL 3113883, at *2; *see also* H.R. Rep. No. 104-664, at 10-11.

For example, Section 3 curtails the ability of gay and lesbian people who are legally married under state law to obtain health insurance as spouses of federal employees, *see* Federal Employees Health Benefits Program, 5 U.S.C. § 8901 et seq.; *Pedersen*, 2012 WL 3113883, at *2, 5, 7, to receive Social Security benefits payable to a surviving spouse on the death of the other spouse, *see* Social Security Act, 42 U.S.C. § 301 et seq.; *Pedersen*, 2012 WL 3113883, at *3, 5, and to take leave to care for an ill spouse, *see* Family and Medical Leave Act, 29 U.S.C. § 2601 et seq.; *Pedersen*, 2012 WL 3113883, at *3, 6; H.R. Rep. No. 104-664, at 11. *See generally Pedersen*, 2012 WL 3113883, at *2-3, 5-7. As a result of Section 3, while married heterosexuals may file joint federal income tax returns,

married gays and lesbians may not. *See id.* at *6-7. And as was the case here, Section 3 requires gays and lesbians to pay federal estate tax on the estate of their deceased spouses—in this case, a penalty of $363,053—while a person in a heterosexual marriage would qualify for an unlimited marital tax deduction. *See* 26 U.S.C. § 2056(a).

III. 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.

DOMA 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. Cleburne*, 473 U.S. at 440 (observing that classifications based on race, alienage, or national origin "are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others"); *Frontiero*, 411 U.S. at 686-87 (plurality opinion) (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 anti-miscegenation law is to maintain white supremacy); *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting) (noting that the "real meaning" of the law 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, even assuming that it could not pass constitutional muster under a much more relaxed standard of review. Heightened scrutiny locates in the judiciary the responsibility of forcing society to reexamine assumptions that are rooted in animus, bigotry, and social stereotypes that in turn entrench social caste. 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.

CONCLUSION

For the foregoing reasons, as well as those outlined by Windsor as Appellee, the judgment of the district court should be affirmed on the alternative grounds that Section 3 of DOMA is unconstitutional under heightened scrutiny.

Dated: September 7, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because this brief contains 4,167 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point font.

Dated: September 7, 2012

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CERTIFICATE OF SERVICE

I certify that, on September 7, 2012, pursuant to Local Rule 25.1(c)(1), I electronically filed the foregoing Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Plaintiff-Appellee and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that, pursuant to Local Rule 31.1, I caused six paper copies of the brief to be delivered by hand to the Clerk of the Court on September 7, 2012.

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