Nos. 14-556, 14-562, 14-571 and 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, *et al*, Petitioners,
v.
RICHARD HODGES, *et al.*, Respondents.

VALERIA TANCO, *et al.*, Petitioners
v.
BILL HASLAM, *et al.*, Respondents.

APRIL DE BOER, *et al.*, Petitioners,
v.
RICK SNYDER, *et al.*, Respondents.

GREGORY BOURKE, *et al.*, Petitioners,
v.
STEVE BESHEAR, *et al.*, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *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 it believes that every person in the United States deserves to be free from discrimination based on race, ethnicity, gender, or sexual orientation.

The Leadership Conference Education Fund ("The Education Fund") is the research, education, and communications arm of The Leadership Conference. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better understanding of issues of prejudice.

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[1] Respondents have granted blanket consent to the filing of *amicus curiae* briefs and petitioners have consented to the filing of this brief in a letter being filed herewith. No counsel for any party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

A list of The Leadership Conference's members is set forth in Appendix A. Several organizations also join as individual signatories to this brief. Those organizations are identified and their interests are set forth in Appendix B.

SUMMARY OF ARGUMENT

The Constitution requires states both to license marriages between two persons of the same sex and to recognize such marriages that are lawfully performed in other states. This constitutional mandate is rooted in two separate provisions of the Fourteenth Amendment: the Due Process Clause, which protects the fundamental right to marry, and the Equal Protection Clause, which protects against invidious discrimination. Although either of these provisions, standing alone, would be sufficient to invalidate the laws at issue in this case, *amici* urge the Court not to rest its decision on either ground alone. Instead, this Court should hold not only that marriage is a fundamental right and that the Due Process Clause prohibits states from impeding same-sex marriage, but also that *all laws* that discriminate based on sexual orientation—including laws impeding same-sex marriage—are constitutionally suspect and subject to heightened scrutiny under the Equal Protection Clause.

1. There are several reasons why the Court should address the Equal Protection Clause argument, instead of limiting its inquiry to the Due Process Clause. First, a decision on this issue is necessary to resolve an existing split among the circuits and the states. The Second, Seventh, and Ninth Circuits have held that sexual orientation classifications are subject to heightened scrutiny under the Equal Protection Clause. Four state courts of last resort

have also relied on this Court's equal protection jurisprudence to hold that that heighted scrutiny is required under state constitutional analogs to the Equal Protection Clause. In contrast, the Sixth Circuit and the Florida Supreme Court have held that sexual orientation discrimination is subject only to rational basis review, notwithstanding this Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013). If the Court does not resolve the split, the Equal Protection Clause will continue to be enforced unequally in different parts of the country.

Second, while it is possible to decide this case under the Due Process Clause alone (because, as the Fourth and Tenth Circuits have held, laws impeding same-sex marriage unconstitutionally deny gay people a fundamental right),[2] that approach would not resolve the proper standard for reviewing laws that discriminate against gay people outside of the marriage context. Marriage is not the only arena in which gay people suffer invidious discrimination at the hand of the state. To the contrary, as discussed below, there are a wide array of laws that deny gay people the same rights and privileges enjoyed by others. This Court should expressly hold that, because such laws typically reflect irrational prejudice and antipathy, they must be subject to heightened scrutiny.

Finally, while the laws at issue here fail even rational basis review, the Court should nonetheless make clear that heightened scrutiny is warranted. Otherwise, the lower courts will continue to exhibit

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[2] *Bostic v. Schaefer*, 760 F.3d 352, 375-77 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1199, 1209-19 (10th Cir. 2014).

confusion and disagreement over the proper level of scrutiny to afford to laws that discriminate based on sexual orientation. Moreover, application of rational basis review would send a powerful message to the public, to lower courts, and to legislators that discrimination against gay people is not as serious as other forms of invidious discrimination, and such a message would tend to reinforce, rather than counteract, existing prejudices.

2. Adoption of heightened scrutiny in this case would be consistent with the Court's past practice. This Court has chosen to address constitutional questions of broad applicability where necessary to protect a broad array of rights, even if the case at hand might have been decided on narrower constitutional grounds. *See Lawrence*, 539 U.S. at 574-75. The Court's equal protection jurisprudence has also frequently evolved over time, as the Court has gained increasing familiarity with and understanding of certain types of discrimination. For example, in the 1970s, the Court addressed numerous cases involving discrimination based on gender and illegitimacy and, in both contexts, over the course of that decade the Court evolved from applying rational basis review to expressly requiring heightened scrutiny. Similarly, although this Court applied rational basis review to sexual orientation discrimination in *Romer v. Evans*, 517 U.S. 620, 635 (1996), the Court's perspective on this issue has evolved over the past nineteen years. It is now time for the Court to expressly recognize what is evident from *Romer*, *Lawrence* and *Windsor*—that classifications based on sexual orientation are rooted in prejudice and animosity, unrelated to any legitimate government interest, and that laws discriminating against gay peo-

ple should therefore be subject to heightened scrutiny.

3. Sexual orientation discrimination meets every factor this Court has identified for determining whether a class qualifies for heightened scrutiny under the Equal Protection Clause. Gay people have suffered a long history of discrimination that has been enshrined by state and federal law, and this historical discrimination has been made on the basis of stereotyped characteristics that bear no relation to individual abilities. Moreover, although not necessary to invoke heightened scrutiny, it is nonetheless relevant that gay people are a discrete group, readily identifiable by an "immutable" characteristic, and that they represent a small minority of the population with limited political power. Because gay people cannot rely on the ordinary political process to protect themselves from the invidious discrimination and prejudice that has long existed in this country, and that still exists today, it is the job of the courts—and this Court in particular—to safeguard their right to equal protection under the law.

ARGUMENT

I. The Court Should Decide Whether Classifications Based on Sexual Orientation Are Subject to Heightened Scrutiny.

This case squarely presents the issue of whether classifications based on sexual orientation should receive heightened scrutiny under the Equal Protection Clause. While the Court could follow the Fourth and Tenth Circuits and resolve this case under the Due Process Clause alone, it should not choose that course. Nor should the Court avoid the "heightened scrutiny" question by holding that the laws at issue

fail even rational basis review (although they do). Instead, for several reasons, the Court should expressly hold that laws impeding same-sex marriage—and *all other laws* that discriminate based on sexual orientation—are subject to heightened scrutiny.

1. Currently, there is a split among the circuits and the states on whether laws that discriminate based on sexual orientation are subject to heightened scrutiny. Before this Court's decisions in *Lawrence* and *Windsor*, several federal courts of appeal and state high courts had held that laws discriminating based on sexual orientation were subject only to rational basis review and, thus, should be upheld so long as they were rationally related to a legitimate governmental purpose.[3] But since 2012, three federal courts of appeal (the Second, Seventh, and Ninth Circuits) have squarely held that sexual orientation classifications are subject to heightened scrutiny under the Equal Protection Clause.[4] The Seventh and Ninth Circuits relied on this rationale to invalidate prohibitions on same-sex marriage.[5] In addition four state courts of last resort (California, Connecticut, Iowa, and New Mexico) have held that heightened scrutiny is required under state constitutional analogs to the Equal Protection Clause, and on that ba-

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[3] *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-68 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 817-26 (11th Cir. 2004); *Andersen v. King Cnty.*, 138 P.3d 963, 996-98 (Wash. 2006).

[4] *See Baskin v. Bogan*, 766 F.3d 648, 654-57 (7th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474, 480-84 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir. 2012);

[5] *Baskin*, 766 F.3d at 654-57; *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014).

sis invalidated same-sex marriage prohibitions.[6] These decisions rely heavily on this Court's equal protection jurisprudence and are thus highly informative as to the proper level of scrutiny that should be applied under the federal Equal Protection Clause.

By contrast, the Sixth Circuit in this case adhered to the view that sexual orientation classifications should be subject only to rational basis review, notwithstanding this Court's decisions in *Lawrence* and *Windsor*.[7] Florida's court of last resort has also held that it will continue to apply rational basis review to classifications based on sexual orientation under both the federal and Florida Constitutions.[8]

There is therefore a clear split among both the circuits and the states concerning the level of scrutiny to use when reviewing laws that discriminate based on sexual orientation under the federal Equal Protection Clause. If this Court does not address this issue now, the split will continue (and perhaps even

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[6] *See In re Marriage Cases*, 183 P.3d 384, 443, 452 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431-32, 481 (2008); *Varnum v. Brien*, 763 N.W.2d 862, 896, 904 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 884, 888-89 (N.M. 2013). In the case of California, voters later approved a constitutional amendment specifically to prohibit same-sex marriages (but not otherwise addressing the level of scrutiny for sexual orientation discrimination), which was invalidated by a federal district court. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013).

[7] *DeBoer v. Snyder*, 772 F.3d 388, 410-16 (6th Cir. 2014).

[8] *See D.M.T. v. T.M.H.*, 129 So.3d 320, 341-42 (Fla. 2013) ("Sexual orientation has not been determined to constitute a protected class and therefore sexual orientation does not provide an independent basis for using heightened scrutiny to review State action that results in unequal treatment to homosexuals.").

deepen), leading to unequal enforcement of the Equal Protection Clause in different parts of the country.

2. This Court also should decide the appropriate level of scrutiny for sexual orientation discrimination under the Equal Protection Clause because resolution of this question is important to protect against the many instances of state-sponsored discrimination against gay people outside the marriage context.

This Court has recognized that, where there are multiple constitutional grounds for invalidating a statute, it is appropriate to consider which grounds will provide broader guidance to the lower courts. For example, in *Lawrence*, the Court addressed the constitutionality of a Texas statute prohibiting certain intimate sexual conduct between same-sex partners, but not between different-sex partners. The Court noted that petitioners and some *amici* had raised a "tenable argument" that the statute violated the Equal Protection Clause. 539 U.S. at 574. But it chose not to rule on the ground, holding instead that the law infringed on liberty interests in violation of the Due Process Clause. *Id.* at 578-79. Explaining its rationale for choosing this course, the Court stated: "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Id.* at 575.

That same logic suggests a different outcome here. Were this Court to limit its decision to the Due Process Clause, and invalidate the laws at issue only because marriage is a fundamental right, many courts and legislators would question the breadth of that holding, and suggest that other forms of discrimination against gay people might pass constitutional

muster. To avoid this result, the Court should issue a ruling that will provide maximal guidance to the lower courts and provide a framework for addressing sexual orientation discrimination claims in all of the many different contexts in which they arise.

Many laws discriminating against gay people do not involve clearly established fundamental rights. For example, many gay people (whether married or unmarried) seek to adopt children. Although the issue of adoption is similar in nature to marriage (and in many cases the two may be closely intertwined), several circuits have held that there is no fundamental right to adopt,[9] and the Eleventh Circuit relied on this rationale in rejecting a constitutional challenge to a Florida law that expressly prohibited adoption by gay people.[10] So if this Court were to invalidate prohibitions on same-sex marriage based solely on a fundamental rights rationale, some states might continue to assert that gay people, married or unmarried, could still be denied the right to adopt children, regardless of their fitness as parents.

Similarly, this Court and the lower courts have long held that there is no "fundamental right" to public employment. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) ("This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental.").[11] So if

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[9] *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011); *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989).

[10] *Lofton*, 358 F.3d at 811. A Florida state court later held that the law violated the Florida Constitution. *See Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79, 92 (Fla. Dist. Ct. App. 2010).

[11] *See also, e.g.*, *Singleton v. Cecil*, 176 F.3d 419, 425-26 (8th Cir. 1999) (en banc) ("[A] public employee's interest in contin-

the Court were to invalidate prohibitions on same-sex marriage based solely on a fundamental rights rationale, state and local governments might still feel emboldened to argue that they are entitled to fire gay people, or refuse to hire them in the first place, based solely on their sexual orientation.

Nor should the Court avoid the heightened scrutiny issue by holding, as it did in *Romer*, 517 U.S. at 635, that the laws at issue here fail even rational basis review. Such a decision would allow the existing split among the circuits and the states to persist, leaving courts and legislators uncertain about the proper standard of review to apply when addressing sexual orientation discrimination. Moreover, by applying only rational basis review, the Court would be sending a powerful message that discrimination against gay people is no more consequential than, for example, drawing distinctions between different groups of taxpayers or civil servants or distinctions based on geographic location.[12] That message is particularly damaging when it is endorsed by govern-

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ued employment with a governmental employer is not so 'fundamental' as to be protected by substantive due process.").

[12] *See, e.g.*, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2079-84 (2012) (applying rational basis review to tax classification); *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988) (applying rational basis review to law that singled out households that had members on strike); *Murgia*, 427 U.S. at 313 (applying rational basis review to law that singled out uniformed state police officers over 50); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (applying rational basis review to law that singled out residents of "districts that happen to have less taxable wealth than other districts"); *Kwong v. Bloomberg*, 723 F.3d 160, 164 (2d Cir. 2013) (applying rational basis review to law that singled out those located within New York City).

ment institutions—even more so when it comes from this Court—and it inevitably tends to reinforce, rather than counteract, existing prejudices. As this Court recognized in *Lawrence*, sexual orientation is an integral component of personal identity. It is not equivalent to other classifications that receive rational basis review, and the Court's equal protection jurisprudence should reflect that fact.

II. Adoption of Heightened Scrutiny Would Be Consistent With This Court's Past Practice.

While this Court has never expressly held that classifications based on sexual orientation are subject to heightened scrutiny, its recent decisions clearly point in that direction. In *Romer*, although the Court applied rational basis review, it recognized that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." 517 U.S. at 633, 634. The Court's analysis in *Romer* therefore functionally reflected "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012).

In *Lawrence*, the Court recognized that laws criminalizing homosexual conduct are "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* While *Lawrence* was decided on due process grounds, the Court made clear that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." 539 U.S. at 575. Indeed, by overruling *Bowers v. Hardwick*, 478 U.S.

186 (1986), and holding that such laws violate due process, the Court eliminated the basic premise that many courts had relied on to justify application of rational basis review.[13] *Lawrence* thus paved the way for application of a heightened standard of scrutiny.

Finally, in *Windsor*, the Court held that, by denying federal recognition to lawful same-sex marriages, the Defense of Marriage Act violated basic due process and equal protection principles. *Windsor*, 133 S. Ct. at 2693. Although the Court did not explicitly state that it was applying heightened scrutiny, that is functionally what it did. As the Ninth Circuit recognized, "[i]n its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline Beecham*, 740 F.3d at 481.

Amici believe the time has come for the Court to make explicit the foundation on which these precedents implicitly rest: that laws discriminating based on sexual orientation are inherently suspect and subject to heightened scrutiny. This would not be the first time that the Court's equal protection jurisprudence has evolved in a short period of time from the application of rational basis review to an express acknowledgment that heightened scrutiny is warranted. To the contrary, this is precisely the path that this Court followed in the 1970s when addressing

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[13] *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (reasoning that "[i]f the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal").

laws that discriminated on the basis of gender and illegitimacy.

In *Reed v. Reed*, 404 U.S. 71 (1971), the Court's first modern foray into gender discrimination, the Court applied rational basis review to invalidate an Idaho law giving preference to men over equally situated women in appointments as estate administrators.[14] Over the years, the Court invalidated several other gender-based classifications, with some justices urging heightened scrutiny and others continuing to rely on *Reed*'s rational basis review.[15] But ultimately, in *Craig v. Boren*, 429 U.S. 190 (1976), the Court synthesized these prior decisions and concluded that, collectively, they established a rule that, "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* Later cases reinforced this standard, making clear that gender-based classi-

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[14] *See Reed*, 404 U.S. at 76 ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . .").

[15] See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973), (plurality opinion of Brennan, J.) (footnotes omitted) ("[C]lassifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny.") (footnotes omitted); *Id.* at 691 (Stewart, J., concurring) (preferring to resolve case under *Reed*); id. at 691-92 (Powell, J. concurring) (same); *Stanton v. Stanton*, 421 U.S. 7, 13-17 (1975) (relying on *Reed* to invalidate a Utah law that set a different age of majority for males and females, without deciding whether gender-based classifications are inherently suspect).

fications require an "exceedingly persuasive justification" to withstand equal protection scrutiny.[16]

Similarly, this Court addressed numerous cases in the 1960s and 1970s involving discrimination based on illegitimacy. Initially, the Court applied rational basis review to invalidate such laws.[17] But the Court's approach to such discrimination evolved over time, and the Court ultimately made clear that a form of heightened scrutiny was required.[18]

In short, although the Court initially attempted to address discrimination based on gender and illegitimacy within the rational basis framework, it ultimately recognized that heightened scrutiny was warranted. Similarly, the Court has now addressed issues relating to sexual orientation discrimination in three major cases since *Bowers*, and the logic of these cases compels the conclusion that sexual orientation classifications must be subject to something more searching than ordinary rational basis review. Just

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[16] *See, e.g.*, *Pers. Adm'r v. Feeney*, 442 U.S. 256, 273 (1979); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *United States v. Virginia*, 518 U.S. 515, 533 (1996).

[17] *See Levy v. Louisiana*, 391 U.S. 68, 71 (1968) (stating that "the end result is whether the line drawn is a rational one"); *Giona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968) (finding "no possible rational basis" for law); *see also Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (law discriminating based on illegitimacy was "illogical and unjust").

[18] *See Lalli v. Lalli*, 439 U.S. 259, 265 (1978) ("Although . . . classifications based on illegitimacy are not subject to 'strict scrutiny,'" they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests"); *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) ("In a case like this, the Equal Protection Clause requires more than the mere invocation of a proper state purpose").

as it did in *Craig* with respect to gender-based discrimination, the Court should now expressly hold that sexual orientation discrimination warrants heightened scrutiny.

III. Under the Framework Utilized By This Court in Past Cases, Sexual Orientation Classifications Warrant Heightened Scrutiny.

Sexual orientation discrimination satisfies all of the standards this Court has identified for determining whether a type of classification qualifies for heightened scrutiny under the Equal Protection Clause. The Court has repeatedly identified two dispositive factors: (1) whether the disfavored group has faced "a history of purposeful unequal treatment,"[19] and (2) whether that discrimination is based on a characteristic that "bears no relation to [a person's] ability to perform or contribute to society."[20] Every suspect or quasi-suspect class identified by this Court has satisfied these factors, and the Court has always accorded heightened scrutiny when these factors are present.

Both of these criteria are easily satisfied here. Gay people have suffered a long history of discrimination that has been enshrined by state and federal law, and this historical discrimination has been made "on the basis of stereotyped characteristics not truly indicative of [gay people's] abilities." *Murgia*, 427 U.S. at 313.

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[19] *Murgia*, 427 U.S. at 313; *see also Frontiero*, 411 U.S. at 684 (plurality opinion) (noting that "our Nation has had a long and unfortunate history of sex discrimination").

[20] *Frontiero*, 411 U.S. at 686; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

The Court has also sometimes remarked on two other factors that, although not controlling, may additionally support the application of heightened scrutiny. These factors are (1) whether the group exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group" and (2) whether they are "a minority or politically powerless."[21] While consideration of these factors is not mandatory, they support the conclusion that heightened scrutiny is appropriate here.

A. Gay People Have Suffered a Long History of Discrimination.

Like other groups that are entitled to heightened scrutiny under the Equal Protection Clause, gay people in the United States have suffered a history of pervasive discrimination, both official and private, that effectively has made them second-class citizens.[22] As the Second Circuit recognized in *Windsor v. United States*, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination," and the point "is not much in debate." 699 F.2d 169, 182 (2d Cir. 2012). "Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many

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[21] *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *see also Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

[22] *See, e.g.*, *Frontiero*, 411 U.S. at 685 (noting that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes," in that "[n]either slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children").

states, homosexual conduct was criminal. These laws had the imprimatur of the Supreme Court." *Id.*

Numerous other courts have acknowledged the long history of prejudice and discrimination against gay people.[23] Indeed, even the Sixth Circuit below recognized "the lamentable reality that gay individuals have experienced prejudice in this country, [both] at the hands of public officials, [and] at the hands of fellow citizens." *DeBoer*, 772 F.3d at 413. Because the extent of such discrimination is incontrovertible and has been well described by other *amici* and experts in this litigation,[24] we touch upon this topic only briefly here.

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[23] *See, e.g.*, *Baskin*, 766 F.3d at 665 ("[U]ntil quite recently homosexuality was anathematized by the vast majority of heterosexuals (which means, the vast majority of the American people), including by most Americans who were otherwise quite liberal. . . . Although discrimination against homosexuals has diminished greatly, it remains widespread."); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do[.]"); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 318 (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."); *Kerrigan*, 957 A.2d at 434 ("[G]ay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation."); *see also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) ("[H]omosexuals have historically been the object of pernicious and sustained hostility . . . .") (internal quotation marks omitted).

[24] *See generally* Br. of *Amicus Curiae* Organization of American Historians; *see also* Report of Professor George Chauncey, filed

First, throughout our history gay people have been the target of official, state-endorsed discrimination that deprived them of the rights enjoyed by other citizens. Indeed, our federal government has acknowledged that it "played a significant and regrettable role in th[is] history of discrimination against gay and lesbian individuals."[25]

This history of state-sponsored discrimination includes not only the type of anti-sodomy laws addressed by this Court in *Lawrence*,, but a plethora of other laws that discriminated against gay people in all areas of public and private life. For example, gay people were 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."[26] 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

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in *Deboer v. Snyder*, No. 12-10285 (E.D. Mich.) ECF 169-1), ¶¶ 6-102.

[25] Br. for the United States at 16, *Windsor v. United States*, 699 F.3d 169, 2012 WL 3548007 (2d Cir. filed Aug. 10, 2012).

[26] *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010) (citations and quotations omitted).

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."[27] The federal government did not officially put a stop to sexual orientation discrimination in hiring until 1998.[28]

The federal government's history of discrimination against gay people extends beyond its hiring practices. Gay welfare organizations were long denied federal tax exemptions on the view that they promoted "perverted or deviate behavior" that is "contrary to public policy and [is] therefore, not 'charitable.'" *Perry*, 704 F. Supp. 2d at 981. Between 1917 and 1990, Congress prohibited gay persons from immigrating to the country.[29] And, until 2011, openly gay people were not permitted to serve in the military, because

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[27] *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, 609 (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).

[28] *See* Exec. Order No. 13,087, 63 Fed Reg. 30,097 (June 2, 1998).

[29] *See* Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (requiring exclusion of "persons of constitutional psychopathic inferiority"); Immigration and Nationality Act, amended October 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending the Immigration and Nationality Act to add "sexual deviation" as a medical ground for denying entry into the United States); 8 U.S.C. § 1182(a)(4) (1982) (prohibiting individuals "afflicted with . . . sexual deviation" from entering this country); Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (finally eliminating "sexual devia[nts]" from the list of excludable aliens).

the federal government had determined that "they had a 'personality disorder' or a 'mental illness,'"[30] and that they "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[31]

These federal policies reflected a deep-seated belief by the majority of Americans throughout our history that homosexuality is immoral. *Lawrence*, 539 U.S. at 571 (noting that "for centuries there have been powerful voices to condemn homosexual conduct as immoral"); *Golinski*, 824 F. Supp. 2d at 985-86; *Perry*, 704 F. Supp. 2d at 936-38, 981. Gay people were frequently viewed as likely child molesters.[32] Such views were bolstered by the psychiatric profession, which classified homosexuality as a mental disorder until 1973.[33]

Because of these attitudes, gay people have also faced widespread private discrimination, much of which persists to this day. For example, surveys indicate that between 15% and 43% of gay workers

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[30] *Able v. United States*, 968 F. Supp. 850, 855-56 (E.D.N.Y. 1997) (citing Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Sen. Comm. on Armed Servs., S. Hrg. No. 103- 845, 103d Cong., 2d Sess. (1993)).

[31] *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998) (quoting 10 U.S.C. § 654(a)(15) (1994)).

[32] *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").

[33] *See* Am. Psych. Ass'n, Diagnostic and Statistical Manual: Mental Disorders 39 (1952).

have experienced some form discrimination or harassment at the workplace.[34] A recent government study of rental housing transactions found that same-sex couples are significantly less likely to receive a favorable response to inquiries about rental housing.[35] And gay people are disproportionately likely to be the victims of hate crimes. Indeed, FBI statistics show that, in 2013, there were 1402 offenses committed based on sexual orientation, including two homicides, seven rapes, and 740 assaults.[36] By comparison, there were 2,263 offenses motivated by bias against African Americans, who (as discussed below) make up a substantially larger portion of the population.[37]

In short, there is no reasonable dispute that gay people have historically faced, and continue to face, invidious discrimination and prejudice in many aspects of life. This factor strongly favors application of heightened scrutiny.

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[34] *See* M.V. Lee Badgett, *et al.*, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, at 3 (June 2007), *available at* http://williamsinstitute.law.ucla.edu/research/workplace/bias-in-the-workplace-consistent-evidence-of-sexual-orientation-and-gender-identity-discrimination.

[35] U.S. Dep't of Housing & Urban Development, *An Estimate of Housing Discrimination Against Same-Sex Couples,* at vi (June 2013).

[36] Fed. Bureau of Investigation, Uniform Crime Reports: 2013 Hate Crime Statistics, tbl. 4, *available at* http://fbi.gov/about-us/cjis/ucr/hate-crime/2013/topic-pages/victims/victims_final.

[37] *Id.*

B. Sexual Orientation Has No Bearing on One's Ability To Participate in and Contribute to Society.

Classifications based on sexual orientation also easily satisfy the second criterion for application of heightened scrutiny. Sexual orientation has no bearing whatsoever on an individual's ability to participate in and contribute to society. As the American Psychiatric Association has recently reaffirmed, "same-sex attraction, whether expressed in action, fantasy, or identity, implies no impairment *per se* in judgment, stability, reliability, or general social or vocational capabilities."[38] Gay people are as able as straight people to engage in any and all fields of endeavor. As relevant to this case, gay people are as capable as straight people of entering into loving, committed relationships with a partner. They are equally capable of raising children and attending to other family matters. Gay people also have the same abilities as straight people to attend school, to work, to serve in the military, and to hold political office. There is no legitimate reason for discrimination in these or other areas.

Historically, gay people have suffered discrimination not because of their abilities, but because of moral disapproval and the perceived view that their mere presence would cause discomfort to those around them.[39] But this Court made clear in *Law-*

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[38] Am. Psych. Ass'n, *Position Statement on Issues Related to Homosexuality* (Dec. 2013).

[39] *See, e.g.*, *Steffan v. Perry*, 41 F.3d 677, 682-83 (D.C. Cir. 1994) (en banc) (quoting military's rationale for ban on gay service members based on perception that they would adversely affect "discipline, good order and morale").

rence that moral disapproval of homosexual conduct cannot justify discrimination against gay people: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence*, 539 U.S. at 577-78 (quoting and endorsing Justice Stevens's dissent in *Bowers*). Nor is discomfort a valid basis for discrimination. Many Americans were highly uncomfortable with the idea of interracial marriage, school desegregation, and a racially integrated work force. Likewise, many Americans no doubt were uncomfortable with having women in positions of power and authority. But this Court has never held that this kind of discomfort is a legitimate basis for discrimination.

Moreover, even if one could identify some circumstances where discrimination on the basis of sexual orientation might be rational—and *amici* can conceive of none—that would not be a reason for denying heightened scrutiny. When considering whether heightened scrutiny should apply, the Court looks "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 [it]."[40] Because sexual orientation has no bearing on ability or fitness to contribute to society as a general matter, heightened scrutiny is warranted.

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[40] *City of Cleburne*, 473 U.S. at 446 (emphasis added).

C. Sexual Orientation Is an Obvious, Immutable, and Distinguishing Characteristic.

Although this Court has never denied heightened scrutiny to a class of persons who satisfy the two factors discussed above, in assessing the appropriate level of scrutiny to apply, the Court also has sometimes considered whether the characteristic or trait giving rise to the discrimination is "obvious, immutable, or distinguishing" so as to define the class "as a discrete group." *Lyng*, 477 U.S. at 638; *accord Bowen*, 483 U.S. at 602-03. As the Second Circuit recognized in its decision in *Windsor*, the defining characteristic need not be obvious *and* immutable *and* distinguishing—it simply has to be sufficiently concrete so as to provide some basis for defining those who possess it as a discrete group. What matters is "whether the characteristic of the class calls down discrimination when it is manifest." *Windsor*, 699 F.3d at 183.

Gay people epitomize the type of "discrete group" to whom the Court has afforded heightened scrutiny. Most people readily identify themselves as gay, straight, or bisexual, and this is a fundamental characteristic that defines a person individually and shapes his or her relations with society at large. On several occasions, this Court has already recognized gay people as a "distinct group." *See, e.g.*, *Windsor*, 133 S. Ct. at 2690 (noting that DOMA singles out a readily identifiable "class of persons that the laws of New York, and of 11 other States, have sought to protect"); *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."). Indeed, the very existence of laws prohibiting same-sex marriage, criminalizing same-sex sexual activity, and otherwise discriminating against gay people demonstrates how readily society distinguishes people based on sexual orientation.

Furthermore, although this Court has made clear that a trait need not be immutable in order to give rise to heightened scrutiny,[41] sexual orientation does, in fact, fall within this Court's definition of an "immutable" trait. The Court has suggested that immutability goes beyond traits that are "determined solely by the accident of birth," *Frontiero*, 411 U.S. at 686,[42] to include any characteristic that is "beyond the[] control" of those who possess it, *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). It therefore makes no difference whether a person's sexual orientation is

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[41] For example, 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 gender, the Court has never been suggested that this fact would have any bearing on the application of heightened scrutiny to gender-based classifications. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment); *see also Windsor*, 699 F.3d at 183-84 (concluding that "sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals" without addressing immutability).

[42] The Court noted in *Frontiero* that sex, race, and national origin are "immutable characteristic[s] determined solely by the accident of birth," but it did *not* hold that a characteristic must be present at birth in order to be immutable. 411 U.S. at 686.

fixed at birth, develops over time, or even can change at some point in life. What matters is that sexual orientation, once established, is not something that a person can voluntarily change or that can be changed by external factors.[43]

There is an overwhelming consensus in the scientific and medical communities that sexual orientation is not a "choice"—that it is not something a person can control at will. For example, an exhaustive study by the American Psychological Association found that "efforts to change sexual orientation are unlikely to be successful and involve some risk of harm," including "loss of sexual feeling, depression, suicidality, and anxiety."[44] The American Psychiatric Association has also concluded that "[n]o credible evidence exists that any mental health intervention can reliably and safely change sexual orientation"

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[43] *See Baskin*, 766 F.3d at 657 ("That homosexual orientation is not a choice is . . . [also] suggested by the absence of evidence (despite extensive efforts to find it) that psychotherapy is effective in altering sexual orientation in general and homosexual orientation in particular."); *Watkins*, 875 F.2d at 726 (Norris, J., concurring) ("[O]nce acquired, our sexual orientation is largely impervious to change"); (Norris, J., concurring) *Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); *Dean v. Dist. of Columbia*, 653 A.2d 307, 347 n.50 (D.C. 1995) (Ferren, J., dissenting) ("exclusive homosexuality probably is so deeply ingrained that one should not attempt or expect to change it") (citation omitted).

[44] Am. Psych. Ass'n, Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, at v, 27, 83 (2009). Additionally, virtually every major mental health organization has now issued a public policy statement declaring that sexual orientation change efforts, were neither effective nor ethical.

and that "efforts to do so represent a significant risk of harm."[45] Similarly, the Pan American Health Organization has stated that sexual orientation is "an integral personal characteristic that cannot be changed" and noted that "testimonies abound about harms to mental and physical health resulting from the repression of a person's sexual orientation."[46] This scientific consensus is supported by substantial empirical data. For example, in a recent survey, 95% of self-identified gay men and 83% of self-identified lesbians reported that they had "no choice at all" or only a "small amount of choice" in their sexual orientation.[47]

In the past, some courts had asserted that, despite this scientific and medical consensus, sexual orientation nonetheless remains mutable because a person can always decline to engage in same-sex sexual ac-

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[45] Am. Psych. Ass'n, *Position Statement on Issues Related to Homosexuality* (Dec. 2013).

[46] Pan American Health Organization, *"Cures" For an Illness That Does Not Exist: Purported Therapies Aimed at Changing Sexual Orientation Lack Medical Justification and Are Ethically Unacceptable* (2012); *see also* Am. Ass'n for Marriage & Fam. Therapy, *Positions on Couples and Families: Reparative/Conversion Therapy* (Mar. 25, 2009), Am. Med. Ass'n, Policy H-160.991, *Health Care Needs of the Homosexual Population*; Am. Psychoanalytic Ass'n, *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression* (2012).

[47] *Golinski*, 824 F. Supp. 2d at 986 (citing G.M. Herek, *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, SEXUALITY RES. & SOC. POL'Y (2010)); *see also Perry*, 704 F. Supp. 2d at 966 (same).

tivity.[48] But this Court has rejected the artificial distinction between the conduct of engaging in same-sex activity and the status of being gay. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."). Accordingly, courts now consistently hold based on the clear medical and scientific consensus, that sexual orientation is immutable. As the Seventh Circuit put it, "there is little doubt that sexual orientation . . . is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice." *Baskin*, 766 F.3d at 657.[49]

Finally, even if gay people had some degree of control over their sexual identity—which they generally do not—that fact would in no way diminish the case for heightened scrutiny here. As numerous courts have recognized, the relevant inquiry is not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot *or should not* be required to abandon. As the California Supreme Court put it, "[b]ecause a per-

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[48] *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (stating that homosexuality "is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes").

[49] *See also Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 36-37 (D.C. 1987) ("sexual orientation [is] a status which is 'determined by causes not within the [individual's] control' . . . and one not generally subject to change") (citations omitted); *Dean*, 653 A.2d 307, 346 (D.C. 1995) (Ferren, J., dissenting) (citing scientific research demonstrating that "sexual orientation is formed at an early age, has a genetic or hormonal basis, and is highly resistant to change once established").

son's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."[50]

D. Gay People Are a Small Minority Who Cannot Rely on Ordinary Political Processes To Protect Themselves From Discrimination.

Although lack of political power is not a prerequisite for heightened scrutiny, this factor also supports the application of heightened scrutiny here. Gay people are a small minority in the United States, making up less than 5% of the population.[51] As a point of contrast, 2010 census data indicated that 12.6% of the population is African American and 16.3% is Latino.[52]

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[50] *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008); *see also Hernandez-Montiel v. Immigration and Naturalization Serv.*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

[51] 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 (Mar. 3, 2011), *available at* http://cdc.gov/nchs/data/nhsr/nhsr036.pdf (noting that less than 5% of the population self-identifies as gay or bisexual); *see also* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, at 1 (April 2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf (same).

[52] United States Census Bureau, *Overview of Race and Hispanic Origin: 2010*, at 4 (March 2011).

The number of gay people in public office is correspondingly low—in fact, gays are underrepresented in public office in comparison to their percentage in the population. In the current Congress, for example, just 7 of 535 members (1.3%) are openly gay. There has never been an openly gay member of the Cabinet or of this Court, and there is only one openly gay judge on the federal courts of appeal.[53] Gays are equally underrepresented in state legislatures. As of October 2013, just 85 of 7,382 state legislators nationwide, or 1.2%, were openly gay.[54] At the local level, the percentage of gay elected officials is even lower (and largely concentrated in just a few states).[55]

Because of their small numbers, and because of the antipathy and prejudice that is still ubiquitous in many parts of the country, gay people frequently cannot rely on ordinary political processes to protect themselves from discrimination. Indeed, 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.[56]

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[53] Expert Declaration of Gary M. Segura, filed in *Obergefell v. Wymyslo*, No. 1:13-cv-501 (S.D. Ohio), ECF No. 47-1 ("Segura Report"), ¶ 49; Juliet Eilperin, *First Gay U.S. Appeals Court Judge Confirmed*, WASH. POST, Sept. 25, 2013, at A02.

[54] Segura Report, *supra* n.53, ¶ 48.

[55] *Id.* ¶ 50.

[56] Segura Report, *supra* n.53, ¶ 40; *see also* Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 312-13 (2007) ("[G]ays and lesbians do emphatically lose more often than they win when the issue is decided at the ballot box."); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257-58 (1997) (noting that "[g]ay men and lesbians "have seen their civil rights put to a popular vote more

The history of efforts to obtain marriage equality for gay people vividly illustrates this problem. In 1996, in an effort to preempt states from recognizing same-sex marriages, an overwhelming majority of Congress passed, and President Clinton signed into law, the Defense of Marriage Act ("DOMA")—which was, in "its essence," an effort to "interfere[] with the equal dignity of same-sex marriages." *Windsor*, 133 S. Ct. at 2693. Gay citizens lacked the political power necessary to prevent DOMA's enactment or to secure its repeal.

Similarly between 1998 and 2012, 30 states adopted constitutional amendments by ballot initiative to prohibit same-sex marriage.[57] In many cases, these initiatives were supported by supermajorities of more than 60% of voters. In only two instances did such ballot initiatives fail. Gay people and their allies simply did not have large enough numbers to block these actions at the polls.

Other examples abound. For instance, as the Court noted in *Lawrence*, beginning in the 1970s, nine states adopted laws singling out same-sex relations for criminal prosecutions. *Lawrence,* 539 U.S. at 570. Also beginning in the 1970s, a wave of ballot initiatives were enacted to overturn laws protecting gay people from discrimination. The Colorado ballot initiative that this Court invalidated in *Romer* was a typical example. But, notwithstanding *Romer*, both Arkansas and Tennessee recently enacted laws designed to overturn existing protections against sexu-

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often than any other group," and that voters approved 79% of measures to restrict or repeal the rights of gay people).

[57] *See* Segura Report, *supra* n.53, ¶ 47

al orientation discrimination.[58] States have also enacted laws, either by statute or ballot initiative, designed to prevent gay people from adopting children.[59]

That gay people lack political power is evidenced not only by the explicitly discriminatory laws that have been adopted, but also by the failure of many states and the federal government to affirmatively enact laws to protect gay people from discrimination. Notably, 29 states do not have laws generally prohibiting discrimination based on sexual orientation in employment.[60] Nor is there any federal statute protecting gay people from discrimination in employment. A proposed anti-discrimination law, the Employment Non-Discrimination Act ("ENDA") has been a top priority for gay rights advocates for more than 20 years and has been introduced in almost every Congress since 1994, yet Congress has never passed ENDA.

Of course, the picture is not uniformly bleak. Gay people have achieved some significant victories through the political process in recent years, including victories in some states on the issue of marriage

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[58] *See* Ariz. Sess. Laws. Act No. 137 (2015); Tenn. Pub. Acts. ch. 2278 (2011).

[59] Segura Report, *supra* n.54, ¶ 43 (citing 2008 Arkansas ballot initiative and 2012 Arizona statute giving preference to heterosexuals in adoption and foster care programs as recent examples); *see also* Fla. Stat. § 63.042(3) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."). Both the Arkansas and the Florida law were eventually invalidated by state courts, but only after extensive litigation. *See Ark. Dep't of Human Servs. v. Cole*, 380 S.W.3d 429 (Ark. 2011); *Adoption of X.X.G.*, 45 So.3d at 92.

[60] Segura Report, *supra* n.53, ¶ 35.

equality. And public attitudes toward gay people continue to shift toward acceptance and tolerance. But these gains are regionally uneven, and prejudice and antipathy remain widespread in many parts of the country. Accordingly, gay people still "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. Instead, they must look to the courts—and to this Court in particular—to protect their rights.

CONCLUSION

The Court should hold that classifications based on sexual orientation are subject to heightened scrutiny.

Respectfully submitted,

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APPENDIX A

The Leadership Conference on Civil and Human Rights Participating Member Organizations

(Bold names denote Executive Committee member organizations)

A. Philip Randolph Institute

AARP

Advancement Project

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 College for Teacher Education

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 Postal Workers Union, AFL-CIO

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Americans United for Separation of Church and State

Amnesty International USA

Anti-Defamation League

Appleseed

Asian Americans Advancing Justice | AAJC

Asian Pacific American Labor Alliance

Association for Education and Rehabilitation of the Blind and Visually Impaired

B'nai B'rith International

Bend the Arc

Brennan Center for Justice at New York University School of Law

Center for Community Change

Center for Law and Social Policy (CLASP)

Center for Responsible Lending

Center for Social Inclusion

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Church Women United

Coalition of Black Trade Unionists

Coalition on Human Needs

Common Cause

Communications Workers of America

Community Action Partnership

Community Transportation Association of America

Compassion & Choices

DC Vote

Delta Sigma Theta Sorority

Dēmos

Disability Rights Education and Defense Fund

Disability Rights Legal Center

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

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

Muslim Advocates

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 Lesbian Rights

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 Committee to Preserve Social Security & Medicare

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 LGBTQ 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

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

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

ORT America

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

Prison Policy Initiative

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

Outserve-SLDN

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

TASH

Teach For America

The Andrew Goodman Foundation

The Arc

The Association of Junior Leagues International, Inc

The Association of University Centers on Disabilities

The National Conference for Community and Justice

The National PTA

The Voter Participation Center

TransAfrica Forum

Transportation Learning Center

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

Wider Opportunities for Women

Workers Defense League

Workmen's Circle

YWCA USA

Zeta Phi Beta Sorority, Inc.

APPENDIX B

Amici Curiae Joining as Signatories

The following organizations join as individual signatories to this Brief:

9to5

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 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.

American Association for Access, Equity and Diversity

Founded in 1974 as the American Association for Affirmative Action ("AAAA"), the American Association for Access, Equity and Diversity ("AAAED") is a nonprofit organization of equal opportunity, diversity and affirmative action professionals. AAAED promotes understanding and advocacy of affirmative action and other equal opportunity and related compliance laws to realize the tenets of access, inclusion and equality in employment, economic and educational opportunities. It also provides professional de-

velopment and training, to enhance knowledge, productivity and career success.

Andrew Goodman Foundation

The Andrew Goodman Foundation ("AGF") is a non-partisan organization that engages young leaders with the opportunity to create a more peaceful, just and sustainable world. The AGF is named after Andrew Goodman who lost is life on June 21, 1964, registering African Americans to vote and standing up for people who were denied their unalienable rights to life, liberty and the pursuit of Happiness. The LGBT community should have those same rights respected as should the rest of all American citizens.

Asian Americans Advancing Justice | AAJC

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") 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, Advancing Justice | AAJC engages in public policy advocacy, litigation, and community education and outreach on a range of issues, including anti-discrimination. Advancing Justice | 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.

Asian Americans Advancing Justice | Los Angeles

Asian Americans Advancing Justice | Los Angeles ("Advancing Justice-LA") is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (NHPI). As part of its mission to advance civil rights,

Advancing Justice-LA is committed to challenging discrimination and has championed equal rights for the LGBT community, including supporting marriage equality for same-sex couples and opposing California's Proposition 8.

California Association of Human Relations Organizations

The California Association of Human Relations Organizations ("CAHRO") is a state-wide network of human rights and human relations associations. Its purpose is to promote intergroup relations and education as well as the advancement of equity and justice for all persons.

Center for the Study of Hate & Extremism, California State University, San Bernardino

The Center for the Study of Hate & Extremism at California State University, San Bernardino is a nonpartisan university-based research and policy organization devoted to the analysis, and eradication of violence, extremism, and invidious discrimination on the basis of race, religion, national origin, sexual orientation, gender, gender identity, disability and other characteristics. The Center supports equal protection of fundamental personal liberties for all people.

Connecticut Commission on Human Rights and Opportunities

The Connecticut Commission on Human Rights and Opportunities ("CHRO"), established in 1943, is one of the nation's oldest state civil rights agencies. Through civil and human rights law enforcement, as well as advocacy and education, the CHRO works to eliminate discrimination and establish equal opportunity and justice for all persons. In line with Connecticut precedent, the CHRO firmly contends that

classifications based on sexual orientation should be subject to heightened scrutiny.

Courage Campaign

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 the marriage equality cases in the federal and state courts.

Disability Policy Consortium

The Disability Policy Consortium is a statewide civil rights group that promotes the rights of people with disabilities and other groups subject to discrimination that results in the denial of their ability to fully participate in American society.

Disability Rights Education and Defense Fund

The Disability Rights Education and Defense Fund, Inc., ("DREDF"), based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

Empire State Pride Agenda

Empire State Pride Agenda ("ESPA") is New York's statewide lesbian, gay, bisexual and

transgender ("LGBT") civil rights and advocacy group. For 25 years, ESPA has worked to win equality and justice for LGBT New Yorkers and their families. ESPA has been particularly active in advocating for legislation intended to protect LGBT people from discrimination, including the Sexual Orientation Non-Discrimination Act (made law in 2002), the Dignity for All Students Act (made law in 2010), and the Gender Expression Non-Discrimination Act. ESPA was a driving force behind New York's enactment of marriage equality in 2011.

Equal Rights Advocates

Equal Rights Advocates ("ERA") is a national non-profit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant gender discrimination cases in both state and federal courts, and by engaging in other advocacy. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment, which often have been justified by or based on stereotypes and biased assumptions about the roles that women (and men) can or should play in the public and private sphere, including within the institution of marriage. ERA believes that if restrictive marriage laws, such as that which Nevada and other states have adopted, are allowed to stand, millions of gay, lesbian, and bisexual persons in the United States will be deprived of the fundamental liberty to choose whether and whom they will marry—a depri-

vation that offends the core principle of equal treatment under the law.

Equality NC

Equality NC ("ENC") is North Carolina's largest non-profit organization advocating for the rights of lesbian, gay, bisexual and transgender ("LGBT") individuals, with over 100,000 members and supporters. Originally founded in 1979 as the North Carolina Human Rights Fund, Equality NC is arguably the oldest state-wide LGBT equality organization in the United States. Through the course of its advocacy, ENC has worked with a number of North Carolina's LGBT families and is in a unique position to witness the harm of state bans on marriage equality on same-sex couples and their children.

Fairness West Virginia, Inc.

As the primary LGBTQ advocacy organization in West Virginia, Fairness West Virginia has fought since its inception for equal rights for all LGBTQ citizens of the state, estimated to be 57,000 in number. Our efforts have included advocating for marriage equality, and we certainly seek ratification of the 4th Circuit Court's decision holding that Virginia's same sex marriage ban is unconstitutional, and our own Federal District Court's consistent Decision, entered in reliance on the 4th Circuit's Decision. Many same sex couples have now been wed in West Virginia, and we seek for them and for all who wish to marry, security in the permanency of their legally recognized commitments for themselves and their families.

Fred T. Korematsu Center for Law and Equality

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a nonprofit organi-

zation based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Institute for Science and Human Values

The Institute for Science and Human Values ("ISHV"), is committed to the enhancement of human values and scientific inquiry. This combines both compassion and reason in realizing ethical wisdom. It focuses on the principles of personal integrity: individual freedom and responsibility. It includes a commitment to social justice, planetary ethics, and developing shared values for the human family.

National Association of Human Rights Workers

The National Association of Human Rights Workers ("NAHRW"), founded in 1947, is an association of individuals engaged in the profession of human and civil rights. Through research, education and training NAHRW seeks, among other things, to facilitate and improve intergroup relations and equality within a diverse society.

National Black Justice Coalition

The National Black Justice Coalition is the nation's leading Black lesbian, gay, bisexual and transgender ("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. Founded in 2003, NBJC has provided leadership at the intersection of national civil rights groups and LGBT organizations, advocating for the unique challenges

and needs of the Black LGBT community that are often relegated to the sidelines.

National Latina Institute for Reproductive Health

The National Latina Institute for Reproductive Health ("NLIRH") is the only national reproductive justice organization dedicated to building Latina power to advance health, dignity, and justice for the 26 million Latinas, their families, and communities in the United States through leadership development, community mobilization, policy advocacy, and strategic communications. NLIRH embraces gender justice and LGBTQ liberation as core values.

National LGBTQ Task Force

The National LGBTQ 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.

Women's Equal Rights Legal Defense

The Women's Equal Rights Legal Defense and Education Fund ("WERLDEF") is a California nonprofit incorporated in 1978. It is dedicated to educating women about their legal rights and assisting them in vindicating their rights by providing access to the courts by filing amicus curiae briefs on issues that have an impact on equal rights for women. The intent is to help bring women into equal partnership with men in each and every aspect of life and to improve the condition and status of women. Our goal is equal rights for women under the law.