NOS. 10-2204, 10-2207, 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF-APPELLEE,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
DEFENDANTS-APPELLANTS.

DEAN HARA,
PLAINTIFF-APPELLEE/CROSS-APPELLANT,
NANCY GILL, et al.,
PLAINTIFFS-APPELLEES,
v.
OFFICE OF PERSONNEL MANAGEMENT, et al.,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* 31 BAR ASSOCIATIONS, PUBLIC-INTEREST ORGANIZATIONS AND LEGAL SERVICE ORGANIZATIONS IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

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This brief is filed on behalf of the following organizations:

American Civil Liberties Union

American Civil Liberties Union of Massachusetts

Asian American Institute

Asian American Justice Center

Asian Pacific American Legal Center

Boston Bar Association

Equality Federation

Equal Justice Society

Freedom to Marry

Hispanic National Bar Association

Human Rights Campaign

Human Rights Campaign Foundation

Japanese American Citizens League

Jewish Alliance for Law and Social Action

Lambda Legal Defense and Education Fund, Inc.

Lawyers' Committee for Civil Rights and Economic Justice

Legal Momentum

Massachusetts Bar Association

Massachusetts LGBTQ Bar Association

Mexican American Legal Defense and Education Fund

National Asian Pacific American Bar Association

National Black Justice Coalition

National Center for Lesbian Rights

National Gay and Lesbian Task Force Foundation

National LGBT Bar Association

National Organization for Women Foundation

National Women's Law Center

Out and Equal Workplace Advocates

Puerto Rican Bar Association

Southern Poverty Law Center

Women's Bar Association of Massachusetts

CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF *AMICI CURIAE*[1]

Amici are a coalition of bar associations and public-interest and legal-service organizations committed to protecting the equal rights of African-Americans, Latinos, Asian Americans and Pacific Islanders, women, people who are lesbian, gay, bisexual, or transgender, and others. *Amici* submit this brief to ensure that the Constitution's guarantees of equal protection effectively protect all people from invidious discrimination, whether on account of race, gender, national origin, religion, alienage, or sexual orientation.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU has worked for 75 years to oppose discrimination on the basis of sexual orientation and to protect the basic civil rights and liberties of lesbian, gay, bisexual, and transgender people.

The American Civil Liberties Union of Massachusetts ("ACLUM") is a non-profit organization of over 20,000 members and supporters whose purpose is

[1] The parties have consented to the filing of this brief. Counsel for the parties have not authored this brief in whole or in part. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

to defend and protect fundamental civil rights and civil liberties guaranteed by state and federal constitutions and laws. ACLUM has long been involved in both direct litigation and as amicus, challenging discriminatory practices against protected classes and interference with the exercise of fundamental rights.

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

The Asian American Justice Center ("AAJC"), member of the Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization in Washington, DC, whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of issues, including antidiscrimination, and is committed to challenging barriers to equality based on sexual orientation.

The Asian Pacific American Legal Center ("APALC"), a member of Asian American Center for Advancing Justice, is the nation's largest public

interest law firm devoted to the Asian American and Pacific Islander communities. As part of its mission to advance civil rights, APALC has championed the equal rights of the LGBT community, including supporting the freedom to marry and opposing Proposition 8.

The Boston Bar Association ("BBA") traces its origins to meetings convened by John Adams in 1761, thirty-six years before he became United States President. The BBA works to advance the highest standards of excellence for the legal profession, to serve the community at large, and to advocate for access to justice, including the right of all persons to equality under law.

Equality Federation is the national alliance of state-based LGBT advocacy organizations. The Federation works to achieve equality for LGBT people in every U.S. state and territory by building strong and sustainable statewide organizations.

The Equal Justice Society ("EJS") is a national legal organization that promotes equality and an end to all manifestations of invidious discrimination and second-class citizenship. Using a three-prong strategy of law and public policy advocacy, building effective progressive alliances, and strategic public communications, EJS's principal objective is to combat discrimination and inequality in America.

Freedom to Marry is the campaign to win marriage nationwide. Founded in 2003 and based in New York, Freedom to Marry works to end discrimination in

marriage and has participated as amicus curiae in several cases brought by couples challenging their unfair exclusion from marriage.

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

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

Human Rights Campaign Foundation ("HRC Foundation") is an affiliated organization of the Human Rights Campaign. HRC Foundation's cutting-edge programs develop innovative educational resources on the many issues facing lesbian, gay, bisexual and transgender individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity.

The Japanese American Citizens League ("JACL") was founded in 1929 and is the oldest and largest Asian American civil rights organization in the United

States. It led the fight for redress for Japanese Americans incarcerated during World War II and has also fought for the civil liberties of all people including the right to vote, own real property, get a job, and marry a person of one's choice.

The Jewish Alliance for Law and Social Action ("JALSA") is a Boston-based membership organization, working on issues of social and economic justice, civil rights, and constitutional liberties. JALSA seeks to end discrimination based on race, religion, ethnicity, gender, sexual orientation, and gender identity through passage of legislation, participation as *amici* in court cases, and social action.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work. Lambda Legal was counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), and has an interest in ensuring that laws that discriminate on the basis of sexual orientation receive the heightened scrutiny that equal protection demands.

The **Lawyers' Committee for Civil Rights and Economic Justice (the "Lawyers' Committee")** is a nonprofit, nonpartisan legal organization in Boston, Massachusetts representing victims of race or national origin discrimination. The Lawyers' Committee joins this brief in support of the constitution's long-held

presumption against classifications, like those based on sexual orientation, that divide and harm groups who have suffered a history of invidious discrimination.

Legal Momentum is the nation's oldest legal defense and education fund dedicated to advancing the rights of all women and girls. For more than 40 years, Legal Momentum has made historic contributions through litigation and public policy advocacy to advance economic and personal security for women.

The Massachusetts Bar Association ("MBA"), founded in 1910, is a non-profit statewide bar association that serves the legal profession and the public by promoting the administration for justice, legal education, professional excellence and respect for the law.

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

The Mexican American Legal Defense and Education Fund ("MALDEF"). Founded in 1968, MALDEF is the nation's leading Latino legal civil rights organization. Its principal objective is to promote the civil rights of all Latinos living in the United States through litigation, advocacy and education.

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students. Since its inception in 1988, NAPABA has been at

the forefront of national and local activities in the areas of civil rights and advocated for the interests of Asian Pacific American attorneys and their communities.

The National Black Justice Coalition ("NBJC") is a civil rights organization dedicated to empowering Black LGBT people, and its mission is to eradicate racism and homophobia. As America's leading national Black LGBT civil rights organization focused on federal public policy, NBJC envisions a world where all people are fully-empowered to participate safely, openly and honestly in family, faith and community, regardless of race, sexual orientation or gender expression.

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has an interest in ensuring that laws that treat people differently based on their sexual orientation are subject to heightened scrutiny, as equal protection requires.

The National Gay and Lesbian Task Force Foundation (the "Task Force"), founded in 1973, is the oldest national LGBT civil rights and advocacy organization. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal participation of same-sex couples in the institution of civil marriage.

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

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

The National Women's Law Center ("NWLC") is a non-profit legal organization that has worked since 1972 to advance and protect women's legal rights. The NWLC focuses on major areas of importance to women and their families, including income security, employment, education, and reproductive rights and health, with special attention to the needs of low-income families. The NWLC has participated as counsel or amicus curiae in countless cases before the

Supreme Court and the federal courts of appeals to secure the equal treatment of women under the law.

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

Formed in 1957, the **Puerto Rican Bar Association, Inc. ("PRBA")**, the oldest ethnic bar association in the State of New York, has grown from a handful of Puerto Rican members to hundreds of attorneys committed to meeting the challenges confronting Latinos in the legal profession and the community. The PRBA thrives to ensure the abolition of any law which discriminates on the basis of race, gender, ethnic origin, disability status, marital status, gender identity or sexual orientation.

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. SPLC's work on behalf of the lesbian, gay, bisexual, and transgender community spans decades – from an early case challenging the military's anti-gay policy, *Hoffburg v. Alexander*, to the monitoring of anti-gay hate and extremist groups today.

The Women's Bar Association of Massachusetts ("WBA") is a professional association comprised of over fifteen hundred attorneys, judges, and policymakers dedicated to promoting and advancing gender equity and to advancing and protecting the interests of women in the law and legal profession. The WBA has been active in advocating for the elimination of discriminatory practices and beliefs in the legal system and has filed numerous amicus briefs in matters involving sex discrimination and discrimination on the basis of sexual orientation.

SUMMARY OF THE ARGUMENT

The Court should decide this case by holding that sexual orientation classifications must be subjected to heightened scrutiny. In a long line of decisions, the Supreme Court has established a framework for determining when courts should be suspicious of government action treating two groups of people differently. The Executive Branch has examined these precedents and concluded that under any reasonable application of the Supreme Court's test, legislative classifications based on sexual orientation should be denied a presumption of constitutionality and instead be subjected to heightened scrutiny. *See, e.g.*, DOJ 9/22 Br. at 28-45.[2]

[2] The Executive Branch has taken this position in cases across the country challenging the constitutionality of the so-called Defense of Marriage Act

The protection of heightened scrutiny for sexual orientation classifications is long overdue. For 25 years, the Supreme Court's erroneous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), effectively distorted federal equal protection case law and prevented gay people[3] from receiving the protection against unjustified unequal treatment that heightened scrutiny provides. During this time period, courts interpreted *Bowers* to categorically foreclose gay people from being treated as a suspect or quasi-suspect class even if they would have received such protections under the traditional equal protection analysis.

Now that *Bowers* has been overruled by *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), the courts must determine whether heightened scrutiny is appropriate by following traditional equal protection analysis instead of relying on discredited precedents that rested on *Bowers*. Although *amici* agree with the plaintiffs that DOMA fails to survive even rational-basis review, invalidating DOMA under rational-basis review would leave the proper standard of scrutiny unresolved and leave gay people in this circuit vulnerable to continued discrimination that purportedly clears the threshold of rationality. Whether through this panel or en

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("DOMA"). *See, e.g.*, *Pederson v. Office of Personnel Mgmt.*, No. 3:10 CV 1750 (VLB) (D. Conn.); *Windsor v. United States*, 10 CIV 845 (BSJ) (S.D.N.Y.); *Golinski v. U.S. Office of Personnel Mgmt.*, No. C 3:10-00257-JSW (N.D. Cal.).

[3] As used in this brief, *amici*'s references to gay people include lesbians, gay men, and bisexual people, who are discriminated against based on sexual orientation.

banc, this Court should apply the same equal protection analysis used by the Executive Branch and finally provide gay people the critical safeguards to which they are entitled under a proper equal protection standard.[4]

ARGUMENT

I. When A Classification Is Rarely Relevant To Government Decisionmaking And Often Has Been Used For Illegitimate Purposes, Courts Treat The Classification As "Suspect" Or "Quasi-Suspect."

Most legislative classifications come to the court with a presumption of constitutionality. Even though it is possible for many classifications to be employed in an unconstitutional manner, courts generally "will not presume that any given legislative action . . . is rooted in considerations that the Constitution will not tolerate." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *accord Baker v. City of Concord*, 916 F.2d 744, 747 (1st Cir. 1990). In order to overcome that presumption, a plaintiff must show that the classification's "relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational" or that the classification is not justified by a "legitimate state interest." *Cleburne*, 473 U.S. at 446-47.

[4] As explained in Plaintiffs-Appellees' Briefs, the panel decision in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), did not consider whether heightened scrutiny would be appropriate based on traditional heightened-scrutiny factors. *See also* DOJ 9/22 Br. at 27 (explaining that the *Cook* decision "fail[ed] to give adequate consideration to these factors").

Certain classifications, however, carry a particularly high risk of being employed illegitimately and are therefore treated as "suspect" or "quasi-suspect." *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). In a long line of cases, the Supreme Court has developed a framework for determining whether a classification should be treated with suspicion and subjected to heightened scrutiny. The essential factors in this framework are (1) whether a classified group has suffered a history of invidious discrimination and (2) whether the classification has any bearing on a person's ability to perform in or contribute to society. As additional -- but not dispositive -- factors, courts occasionally have considered whether the characteristic is immutable or an integral part of a person's identity and whether the group is a minority or lacks sufficient power to protect itself in the political process. *See* DOJ 9/22 Br. at 22 (summarizing these factors); *see also infra* at Section III.A (explaining the relative importance of the heightened-scrutiny factors).

The purpose of examining these various factors is to assess "the likelihood that governmental action premised on a particular classification is valid as a general matter" and therefore entitled to a presumption of constitutionality. *Cleburne*, 473 U.S. at 446. No single factor is dispositive, and each can serve as a warning sign that a particular classification "provides no sensible ground for differential treatment," *id.* at 440, or is "more likely than others to reflect deep-

seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

In our system of separation of powers, the judiciary plays a critical role in carefully reviewing such high-risk classifications under the Equal Protection Clause to ensure that "the democratic majority . . . accept[s] for themselves and their loved ones what they impose on you and me." *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). When the democratic majority refuses to do so, "[i]t is emphatically the province and the duty of the judicial department to say what the law is" and declare the legislation unconstitutional. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). "The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury*] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring); *see also* Federalist 78, at 405 (Hamilton) (G. Carey & J. McClellan eds. 2001). When a classification poses a special risk of such misuse, the courts must examine the classification with "more searching scrutiny" to ensure that the classification is not being used improperly to oppress a vulnerable group. *Carolene Prods.*, 304 U.S. at 153 n.4.

The Supreme Court has "so far . . . given the protection of heightened equal protection scrutiny" to classifications based on race, sex, illegitimacy, religion, alienage, and national origin. *Romer v. Evans*, 517 U.S. 620, 629 (1996); *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

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

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

For the reasons explained below and in the Government's Superseding Brief, sexual orientation should be added to the list of classifications "given the

protection of heightened equal protection scrutiny." *Romer*, 517 U.S. at 629. The government should bear the burden of proving the statute's constitutionality, and it should be required to do so by showing, at a minimum, that the sexual orientation classification is closely related to an important governmental interest. *Cf. Virginia*, 518 U.S. at 532-33 (1996).

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

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

From 1986 to 2003, traditional equal protection analysis for sexual orientation classifications was cut short by the Supreme Court's decision in *Bowers*, which erroneously held that the Due Process Clause does not protect "a fundamental right for homosexuals to engage in sodomy." *Bowers*, 478 U.S. at 190. The Supreme Court overruled *Bowers* in *Lawrence* and emphatically declared that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. But in the meantime, the *Bowers* decision imposed a "stigma" that "demean[ed] the lives of homosexual persons" in other areas of the law as well. *Id.* at 575; *see* DOJ 9/22 Br. at 29. As *Lawrence* explained, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to

discrimination." 539 U.S. at 578. By effectively endorsing that discrimination, *Bowers* preempted the equal protection principles that otherwise would have required subjecting sexual orientation classifications to heightened scrutiny.

By the mid-1980s, judges and commentators had begun to recognize that, under the traditional test, classifications based on sexual orientation should be subject to heightened scrutiny.[5] But after *Bowers,* the circuit courts stopped examining the heightened-scrutiny factors and instead interpreted *Bowers* to categorically foreclose gay people from being treated as a suspect or quasi-suspect class even if they would have received such protections under the traditional equal protection analysis. For example, in its first sexual orientation equal protection decision to consider the issue after *Bowers*, the D.C. Circuit reasoned:

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

[5] *See, e.g.*, *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (sexual orientation classifications "should be subject to strict, or at least heightened, scrutiny"); John Hart Ely, *Democracy & Distrust* 162-64 (1980); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985); Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed.) (1988).

Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987). Six other circuit courts quickly embraced the D.C. Circuit's analysis.[6] To the extent that courts discussed the suspect-classification factors at all, they did so in a cursory fashion and with the assumption that the only characteristic uniting gay people as a class was their propensity to engage in intimate activity that, at the time, was allowed to be criminalized.[7]

By contrast, the few lower courts that actually applied the heightened-scrutiny factors concluded that sexual orientation must be treated as a suspect or quasi-suspect classification. But those decisions were uniformly reversed or superseded by Court of Appeals decisions relying on *Bowers*.[8] Judges Norris and

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[6] *See, e.g.*, *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267-68 (6th Cir. 1995); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Richenberg v. Perry*, 97 F.3d. 256, 260 (8th Cir. 1996).

[7] *See, e.g.*, *Woodward*, 871 F.2d at 1076; *Ben-Shalom*, 881 F.2d at 464; *High Tech Gays*, 895 F.2d at 571.

[8] *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd* 895 F.2d 563 (9th Cir. 1990); *BenShalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis.), *rev'd* 881 F.2d 454 (7th Cir. 1989); *Jantz v. Muci*, 759 F. Supp. 1543, 1546-51 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992); *Equality Found. of Greater Cincinnati v. Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995); *see also Able v. United States*, 968 F. Supp. 850, 864 (E.D.N.Y. 1997), *rev'd* 155 F.3d 628 (2d Cir. 1998) (based on concession from counsel that plaintiffs intended to rely only on rational-basis review).

Canby on the Ninth Circuit forcefully argued that *Bowers* should not prevent courts from properly applying the traditional heightened-scrutiny analysis. *Watkins v. U.S. Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (en banc) (Norris, J., concurring); *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting from denial of rehearing en banc). But the majority of their colleagues on the Ninth Circuit viewed *Bowers* as an absolute barrier to heightened scrutiny. *See High Tech Gays*, 895 F.2d at 571 (holding that *Bowers* precluded sexual orientation from being recognized as a suspect classification); *High Tech Gays*, 909 F.2d at 376 (declining to hear *High Tech Gays* en banc).

B. Federal Appellate Decisions After *Lawrence* Have Improperly Adhered To Pre-*Lawrence* Precedent Without Applying A Proper Heightened-Scrutiny Analysis.

By overruling *Bowers*, the Supreme Court in *Lawrence* effectively revoked that decision's "invitation to subject homosexual persons to discrimination." 539 U.S. at 575. After carefully analyzing the pre-*Lawrence* decisions that relied on *Bowers* to deny heightened scrutiny for sexual orientation classifications, the Executive Branch has correctly concluded that "the reasoning of these decisions no longer withstands scrutiny." DOJ 9/22 Br. at 27. Now that *Lawrence* has overruled *Bowers*, courts should resume the proper heightened-scrutiny analysis that had been prematurely cut short by *Bowers*.

Unfortunately, the circuit courts that have considered the issue after *Lawrence* have erroneously failed to engage in this analysis. Instead, most circuit courts have simply continued to follow cases that relied on *Bowers*.[9] In several of these cases the parties had not submitted briefs on the appropriate standard of scrutiny or otherwise presented the issue to the court.[10]

The only post-*Lawrence* circuit court decision that does not rely on *Bowers* and its progeny is *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), which upheld a state constitutional amendment barring same-sex couples from marrying. But instead of applying the framework established by the Supreme Court to determine whether sexual orientation classifications require heightened scrutiny, the *Bruning* panel reverted to a wholly different question: whether "'individuals in the group affected by a law have distinguishing characteristics

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[9] *See, e.g.*, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 n.9 (10th Cir. 2008); *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (2008); *see generally* Arthur S. Leonard, *Exorcizing the Ghosts of* Bowers v. Hardwick*: Uprooting Invalid Precedents*, 84 Chi.-Kent L. Rev. 519 (2009).

[10] *See, e.g.*, *Price-Cornelison*, 524 F.3d at 1113 n.9 (noting that plaintiff argued in the district court that "lesbians comprise a suspect class, warranting strict scrutiny," … [but] does not reassert that claim now on appeal"); *Witt*, 527 F.3d at 823 (Canby, J., dissenting in part) (noting that plaintiff had not argued on appeal that sexual orientation classifications should receive heightened scrutiny); *see also Johnson,* 385 F.3d at 532 (qualified-immunity case discussing the level of scrutiny during the period from 2000 to 2002 but not addressing what the standard of scrutiny should be after *Lawrence*).

relevant to interests the State has the authority to implement.'" *Id.* at 866-67 (quoting *Cleburne*, 473 U.S. at 441). The court then apparently concluded that because same-sex couples cannot procreate by accident, there exists a rational basis for distinguishing between same-sex and different-sex couples for purposes of conferring the benefits of marriage. *See id.* at 867. The *Bruning* court thus tautologically concluded that rational-basis review should apply to classifications based on sexual orientation because a rational basis allegedly existed for such classifications in some circumstances.

Amici agree with Plaintiffs-Appellees and the Executive Branch that the "responsible procreation" theory is not a rational basis for disparate treatment of gay people. *See* DOJ 1/13 Br. at 29-30. More importantly here, the *Bruning* panel appears to have mistakenly concluded that if a classification sometimes can be "rational," then that classification never should be subjected to heightened scrutiny. That was a serious logical error. If suspect classifications always failed rational-basis review, then there would be no need for heightened scrutiny. The whole point of heightened scrutiny is that the courts must go beyond rational-basis review and require a stronger justification from the government when certain classifications have historically been prone to abuse. *See J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) ("a shred of truth" is not enough to justify the use of invidious stereotypes); *cf. Taylor v. Louisiana*, 419 U.S. 522, 534 (1975)

(discrimination against women jurors cannot be justified "on merely rational grounds") (footnote omitted).

In short -- as the Executive Branch recognizes -- no circuit court after *Lawrence* has properly addressed whether sexual orientation should be afforded heightened scrutiny under the traditional heightened-scrutiny test. Now that the issue has been squarely presented, this Court should not follow erroneous decisions from other circuits that have adhered to *Bowers*-era precedents without analysis. Instead, as discussed below, this Court should look for guidance to the district court decisions that actually analyzed the heightened-scrutiny test before they were overturned on appeal, the opinions of Judges Norris and Canby in *Watkins* and *High Tech Gays*, and several more recent decisions that carefully have examined the heightened-scrutiny test and concluded that sexual orientation must be recognized as a suspect or quasi-suspect classification. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426-62 (Conn. 2008) (analyzing federal precedent when interpreting state constitution); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009) (same); *In re Marriage Cases*, 183 P.3d 384, 442-44 (Cal. 2008) (analyzing factors that parallel the federal test).

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

A. The Most Important Heightened-Scrutiny Factors Are Whether A Classified Group Has Suffered A History Of Discrimination And Whether The Classification Has Any Bearing On A Person's Ability To Perform Or Contribute To Society.

As explained above, when determining whether a classification should be subjected to heightened scrutiny the Supreme Court has examined two essential factors: (1) whether a classified group has suffered a history of invidious discrimination, and (2) whether the classification has any bearing on a person's ability to perform in or contribute to society. The Supreme Court occasionally has considered two others factors to supplement its analysis: whether the characteristic is immutable or an integral part of a person's identity and whether the group is a minority or without sufficient power to protect itself in the political process.

The first two factors are central. *See Kerrigan*, 957 A.2d at 426; *Varnum*, 473 N.W.2d at 889; *In re Marriage Cases*, 183 P.3d at 443. If a classified group has suffered a history of discrimination based on a characteristic that has no bearing on their ability to perform or contribute to society, it is very likely that the classification "provides no sensible ground for differential treatment." *Cleburne*, 473 U.S. at 440; *see Murgia*, 427 U.S. at 313 (heightened scrutiny is appropriate

when members of a group have "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities").

By contrast, neither "immutability" nor "political powerlessness" is a necessary or sufficient condition for applying strict scrutiny. The Supreme Court has rejected claims of heightened scrutiny for groups that are defined by immutable characteristics and granted it for classifications that are not. *See Cleburne*, 473 U.S. at 442 n.10 (disability classifications not subject to heightened scrutiny despite being sometimes immutable); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (alienage classifications subject to heightened scrutiny despite aliens' ability to naturalize); *see also Kerrigan*, 957 A.2d at 427 n.20 (noting that the Supreme Court has frequently omitted any reference to "immutability" when describing the heightened-scrutiny test).

Similarly, the Supreme Court has extended heightened scrutiny to sex classifications even though women are not a minority, *see Frontiero*, 411 U.S. at 686 n.17 (plurality), and the Court will invoke heightened scrutiny to invalidate an otherwise suspect classification regardless of whether a particular use of that classification directly benefits a powerful group or a powerless one, *see Kerrigan*, 957 A.2d at 441 (noting that "heightened scrutiny is applied to statutes that discriminate against men and against Caucasians") (citations omitted) .

As discussed below, sexual orientation easily satisfies the two critical factors of history of discrimination and ability to perform or contribute to society. This Court must therefore subject sexual orientation classifications to heightened scrutiny regardless of whether sexual orientation also satisfies the factors of immutability and political powerlessness. But even if this Court chooses to consider the factors of immutability and political powerlessness, sexual orientation would satisfy those additional factors as well.

B. Gay People Have Suffered A History Of Purposeful Unequal Treatment And Their Sexual Orientation Has No Bearing On Their Ability To Perform Or Contribute.

Sexual orientation plainly satisfies the two essential heightened-scrutiny factors. There is no question that gay people have suffered a long history of invidious discrimination. The long and painful history of that discrimination -- which continues to this day -- has been recounted at length by numerous other courts and has been extensively documented by Plaintiffs-Appellees' expert witnesses and by the government in its superseding brief. *See* (Chauncey Aff.) (JA 369-74, 377-90); DOJ 9/22 Br. at 28-38.

It is similarly well-established that sexual orientation does not bear any relationship to a person's ability to perform in or contribute to society.[11] Although

[11] *See, e.g.*, *Watkins*, 875 F.2d at 725 (Norris, J., concurring in the judgment); *Perry*, 704 F. Supp. 2d at 1002; *Equality Found.*, 860 F. Supp. at 437; *Varnum*,

homosexuality once was stigmatized as a mental illness, the American Psychiatric Association and the American Psychological Association made clear decades ago that a person's sexual orientation is not correlated with any "impairment in judgment, stability, reliability or general social and vocational capabilities." Herek Aff. ¶ 14 (JA 316); *see also Perry*, 704. F. Supp. 2d at 967. Empirical evidence and scientifically rigorous studies have consistently found that lesbians and gay men are as able as heterosexuals to raise children and to form loving, committed relationships. *See* DOJ 1/13 Br. at 30-31; *accord* DOJ 9/22 Br. at 50-51; Lamb Aff. (JA 109). Thus, a person's sexual orientation is not generally relevant to any legitimate policy objective of the government. DOJ 9/22 Br. at 45.

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

Many courts and commentators have questioned whether examining a characteristic's "immutability" should play any role when determining whether heightened scrutiny applies.[12] But even assuming that such an inquiry is relevant, "the overwhelming consensus in the scientific community [is] that sexual orientation is an immutable characteristic," DOJ 9/22 Br. at 39. Although some

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473 N.W.2d at 890; *Kerrigan*, 957 A.2d at 435; *Dean v. District of Columbia*, 653 A.2d 307, 345 (D.C. 1995).

[12] *See, e.g.*, *Cleburne*, 473 U.S. at 442 n.10; John Hart Ely, Democracy and Distrust 150 (1980).

individuals have reported experiencing changes in their sexual orientation, there is no evidence that such changes can be made through an intentional decision-making process or by medical intervention.[13] *See Plyler*, 457 U.S. at 216 (explaining that discrimination based on immutable characteristics often warrants heightened scrutiny because it unfairly burdens groups based on "circumstances beyond their control"); *Lucas*, 427 U.S. at 505 (same). Whether or not sexual orientation is biologically determined, courts therefore have recognized that it is "immutable" for all pertinent purposes here. S*ee, e.g.*, *High Tech Gays*, 909 F.2d at 377 (Canby, J., dissenting); *Able*, 968 F. Supp. at 864; *Equality Found.*, 860 F. Supp. at 426; *Jantz*, 759 F. Supp. at 1548.[14]

Whether gay or straight, a person's sexual orientation is an integral component of a person's identity, and *Lawrence* made clear that gay people cannot be required to sacrifice this central part of their identity any more than heterosexual people may be required to do so. *See Lawrence*, 539 U.S. at 574 ("Persons in a

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[13] *See* Herek Aff. ¶¶ 7-21 (JA 1311-20). The discredited and scientifically unsupported theories advanced by the National Association for Research & Therapy of Homosexuality ("NARTH") as *amicus* in support of the government and by BLAG in other litigation, *see* BLAG Br. at 26 n.7, are not entitled to any weight by this court. *See* Herek Aff. ¶¶ 20-21 (JA 1319-20).

[14] Moreover, as Judge Norris commented in his concurrence in *Watkins*, "[s]cientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation." *Watkins*, 875 F.2d at 725 (Norris, J., concurring).

homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."). Classifications based on sexual orientation thus raise the specter that a legislative majority seeks to impose burdens on gay people that they would be unwilling to accept if applied to their own lives. *Cf. Murgia*, 427 U.S. at 313-14 (explaining that the risk of invidious discrimination based on age is lessened by the fact that old age "marks a stage that each of us will reach if we live out our normal life span"). Courts accordingly have recognized that the fundamental question is not whether a characteristic is theoretically alterable, but instead whether it is an integral component of a person's identity that an individual should not be compelled to change to avoid discriminatory treatment even if it were theoretically possible to do so. *See, e.g.*, *In re Marriage Cases*, 183 P.3d at 442 ("[A] person's sexual orientation is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Watkins II*, 875 F.2d at 725 (Norris, J., concurring in the judgment) (immutability describes "traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them").[15]

[15] *See also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (concluding that sexual orientation is "immutable" for purposes of determining whether gay people are a "social group" eligible for asylum), *overruled on other*

Before *Lawrence*, some lower courts concluded that sexual orientation is not a sufficiently immutable classification to warrant heightened scrutiny. Those courts, however, reached that conclusion by relying on a false distinction between sexual orientation and sexual conduct, reasoning that behavior -- unlike status -- is not immutable.[16] That distinction between sexual orientation and sexual conduct has now been squarely repudiated by the Supreme Court. As *Lawrence* explained, "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." *Lawrence*, 539 U.S. at 575 (emphasis added)); *accord id.,* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."). Indeed, the Supreme Court in *Christian Legal Society Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010), recently rejected a litigant's argument that a prohibition on same-sex intimate conduct is different from discrimination against gay people; the Court explained that "[o]ur decisions

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grounds, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *accord Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (agreeing with *Hernandez-Montiel*).

[16] *See, e.g.*, *Equality Found.*, 54 F.3d at 267; *High Tech Gays*, 895 F.2d at 573; *Woodward*, 871 F.2d at 1076.

have declined to distinguish between status and conduct in this context." *Id.* at 2990; *see also Karouni v. Gonzales*, 399 F.3d 1163, 1172-73 (9th Cir. 2005) (rejecting attempt to distinguish between discrimination based on "homosexual status" and discrimination based on "homosexual acts").

Lawrence and *Christian Legal Society* erase any doubt that sexual orientation, for constitutional purposes, is an immutable characteristic that is an integral part of a person's identity and warrants heightened-scrutiny by the courts.

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

Finally, to the extent that being a minority or lacking political power is relevant to the heightened-scrutiny test, gay people are clearly a small minority and experience more than enough political disadvantages to merit the protection of heightened scrutiny. The continuing political powerlessness of gay people is recounted in depth in the affidavit of Prof. Gary Segura (JA 260) and in the government's superseding brief. DOJ 9/22 Br. at 36-67, 41-43.

Some courts -- and the Bipartisan Legal Advisory Group in other litigation involving DOMA -- have asserted that because gay people have received some modest legal protections, sexual orientation should not be treated as a suspect or quasi-suspect classification. *See High Tech Gays*, 895 F.2d at 574 (citing to a handful of non-discrimination laws and ordinances passed at the state and municipal level); *Ben-Shalom*, 881 F.2d at 466 n.9 (concluding that gay people are

not politically powerless because "*Time* magazine reports that one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual" and because "the Mayor of Chicago participated in a gay rights parade").

That analysis fundamentally misconstrues the Supreme Court's equal protection precedents. The Supreme Court never has construed the concept of political powerlessness to mean that a group is unable to secure *any* protections for itself through the normal political process. When the Supreme Court first began discussing heightened-scrutiny factors, women and racial minorities already had far more legislative protection from discrimination than gay people have today. *See* Segura Aff. ¶¶ 63-67 (JA 283-85). By the early 1970s, African-Americans already were "protected by three federal constitutional amendments, major federal Civil Rights Acts of 1866, 1870, 1871, 1875 (ill-fated though it was), 1957, 1960, 1964, 1965, and 1968, as well as by antidiscrimination laws in 48 of the states." *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting). Likewise, by the time the *Frontiero* plurality recognized sex as a suspect or quasi-suspect classification, Congress already had passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. *See Frontiero*, 411 U.S. at 687-88 (plurality); *Kerrigan*, 957 A.2d at 452-53. These legislative protections did not eradicate invidious discrimination on the basis of race and gender, which continues to this day. And

the existence of these protections did not stop the Supreme Court from holding that discrimination on the basis of race and sex must be subjected to heightened scrutiny.

The limited protections currently provided to gay people do not approach the comprehensive legislation protecting the rights of African-Americans or women by the time classifications based on race and sex were deemed suspect by the courts. There is no federal legislation expressly prohibiting discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing. Segura Aff. ¶ 18 (JA 266). And no federal legislation ever had been passed to protect people on the basis of their sexual orientation until sexual orientation was added to the federal hate crimes laws in 2009. Segura Aff. ¶ 21 (JA 267). Congress only recently authorized repeal of the military's ban on lesbian and gay service members, and it did so only after two courts declared the ban unconstitutional.[17] Even the small steps that the Obama administration has taken to ameliorate discrimination in the benefits paid to lesbian and gay federal

[17] *Log Cabin Republicans v. United States*, No. 04-08425-VAP, 2010 WL 3960791 (C.D. Cal. Oct. 12, 2010), *Witt v. U.S. Dep't of Air Force*, No. 06-5195-RBL, 2010 WL 3732189 (W.D. Wash. Sept. 24, 2010).

employees have been stymied by interpretations of the discriminatory Defense of Marriage Act.[18]

Moreover, when gay people have secured minimal protections in state courts and legislatures, opponents aggressively have used state ballot initiative and referendum processes to repeal laws or even amend state constitutions. "The initiative process has now been used specifically against gays and lesbians more than against any other social group." Segura Aff. at ¶ 29 (JA 270).[19] This extraordinary use of ballot measures to preempt the normal legislative process and withdraw protections from gay people vividly illustrates the continuing disadvantages that gay people face in the political arena. *Cf. Carolene Prods.*, 304 U.S. at 153 n.4 (noting that heightened scrutiny is warranted when majority prejudice "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

There is, in short, no basis for concluding that the limited protections currently provided to gay people "belie[] a continuing antipathy or prejudice and a

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

[19] *See also* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997) (calculating the high rate of success of anti-gay ballot initiatives); Donald P. Haider-Markel *et al.*, *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 312-13 (2007) (same).

corresponding need for more intrusive oversight by the judiciary." *Cleburne*, 473 U.S. at 443. To the contrary, recent history has shown that gay people are uniquely vulnerable in the majoritarian political arena and have been unable to rely on the traditional legislative processes to protect them from invidious discrimination. That vulnerability warrants heightened scrutiny by the courts.[20]

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

Amici agree with the plaintiffs that DOMA fails to survive constitutional review under any level of scrutiny. *Amici* nevertheless urge the Court to decide this case by concluding that sexual orientation is a suspect or quasi-suspect classification and subjecting DOMA to heightened scrutiny.[21]

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[20] Some advocates have cited to Justice Scalia's dissent in *Romer*, which asserted that "because those who engage in homosexual conduct tend to . . . have high disposable income . . . they possess political power much greater than their numbers, both locally and statewide." *Romer,* 517 U.S. at 645-46 (Scalia, J., dissenting). That stereotype is contradicted by empirical economic evidence. The myth that gay people are generally more urban and affluent is drawn from marketing studies aimed at wealthy potential customers; to the extent that reliable economic data exists, the data shows that gay people tend on average to earn *less* than their heterosexual counterparts. *See* M.V. Lee Badgett, *Money, Myths, and Change: The Economic Lives of Lesbians & Gay Men* 24-26, 45-46 (2001); *Andersen*, 138 P.3d at 1031 (Bridge, J., dissenting).

[21] This case does not implicate the doctrine of constitutional avoidance because whatever standard of scrutiny it applies, the Court will have to rest its decision on constitutional grounds. *See* Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. Cal.

This Court has discretion to choose among possible grounds for a decision, and -- as courts and commentators have noted -- it is sometimes more appropriate to decide an important issue of law than to leave the issue unresolved. *See United States v. Lebron-Cepeda*, 324 F.3d 52, 65 (1st Cir. 2003) (Howard, J., concurring) ("[T]here are situations where the potential costs of leaving matters unresolved exceed the costs that can be generated by attempting to resolve an open question."). Leaving important questions unresolved can impose significant burdens on future litigants and courts that do not know what legal standard will be applied to resolve disputes. *See* Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 17 (1996).

In this case, leaving the standard of scrutiny unresolved and invalidating DOMA under rational-basis review would not necessarily be the more "minimalist" approach. To the contrary, by concluding that DOMA fails heightened scrutiny, this Court may avoid deciding the additional question of whether DOMA also fails the more deferential rational-basis test. *Cf. Varnum*, 763 N.W.2d at 899 n.26 ("[W]e do not address whether there is a rational basis for the marriage statute, as the sexual-orientation classification made by the statute is subject to a heightened standard of scrutiny.").

Rev. L. & Soc'l J. 209, 231 n.51 (2009) (distinguishing between doctrine of constitutional avoidance and "selection among constitutional arguments").

In contrast, leaving the standard of scrutiny undecided would waste judicial resources by forcing litigants in every case, such as the present one, to build a record supporting or opposing a law under several different potential standards of review. In order to preserve the argument that sexual orientation should be recognized as a suspect or quasi-suspect factor, litigants must devote time, resources, and briefing space in every case to explain why the traditional suspect classification test justifies heightened review.

With so much at stake for so many people, the Court should decide the issue in this case, where that record has been carefully established and the issue squarely presented by the plaintiffs. This Court should "say what the law is," *Marbury*, 1 Cranch at 177, and make clear that sexual orientation classifications must be subjected to heightened scrutiny. A decision that leaves the appropriate standard of scrutiny unresolved will leave gay people vulnerable to continued discrimination until this circuit has the opportunity to address the issue again. Indeed, leaving the standard of scrutiny undecided has in the past been misinterpreted by lower courts as an affirmative decision that rational basis -- and not heightened scrutiny -- is the appropriate standard of review, which might be used to justify discrimination that purportedly clears the threshold of minimal

rationality.[22] This Court should not needlessly allow such discrimination to continue. Now that *Bowers* has been firmly overruled, this Court has the opportunity to provide gay people with the critical constitutional framework of protections to which they are entitled under a proper equal protection analysis. The *amici* urge this Court to do so.

CONCLUSION

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

Respectfully submitted,

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[22] *See, e.g.*, *Richenberg*, 97 F.3d at 260 n.5; *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (1997); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *see also* DOJ 9/22 Br. at 28 n.11 (noting that some lower courts have misinterpreted *Romer*).

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 8,490. While this is more than half the length allowed for the party's principal brief Fed. R. App. P. 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), it is being filed pursuant to the Motion of *Amici Curiae* 31 Bar Associations, Public-Interest Organizations and Legal Service Organizations for Leave to Exceed Page Limit.

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 in 14 point Times New Roman.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d)(1)(B), I certify that on November 3, 2011, the Brief of *Amici Curiae* 31 Bar Associations, Public Interest Organizations and Legal Service Organizations in Support of Appellees and in Support of Affirmance of the Judgment Below was filed electronically with the Clerk's Office of the United State Court of Appeals for the First Circuit. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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