Nos. 12-144, 12-307

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, *ET AL.*, *Petitioners*
v.
KRISTIN M. PERRY, *ET AL.*, *Respondents.*

UNITED STATES OF AMERICA, *Petitioner*,
v.
EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP, *Respondents.*

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH AND SECOND CIRCUITS

BRIEF OF CONSTITUTIONAL LAW SCHOLARS BRUCE ACKERMAN, ASH BHAGWAT, LEE BOLLINGER, ERWIN CHEMERINSKY, MICHAEL C. DORF, LEE EPSTEIN, BARRY FRIEDMAN, JOHN C. JEFFRIES, JR., LAWRENCE LESSIG, WILLIAM MARSHALL, FRANK MICHELMAN, JANE S. SCHACTER, SUZANNA SHERRY, GEOFFREY R. STONE, DAVID STRAUSS, LAURENCE TRIBE, AND WILLIAM VAN ALSTYNE AS *AMICI CURIAE* ADDRESSING THE MERITS AND SUPPORTING AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars who teach and write in the field. *Amici* have studied, written scholarly commentary on, and have a common professional interest in one of the issues presented in these cases: Whether a classification based on sexual orientation triggers heightened scrutiny under this Court's equal protection jurisprudence.

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Bruce Ackerman, Sterling Professor of Law and Political Science, Yale Law School;

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[1] *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only. All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

For decades, this Court has considered four factors in determining whether a law that discriminates against any particular group should be tested by heightened judicial scrutiny: (1) whether the group has experienced a history of invidious discrimination; (2) whether the defining characteristic of the group is relevant to one's ability to contribute to society; (3) whether the group can effectively protect itself against discrimination through the political process; and (4) whether an individual can, without sacrificing a core aspect of her identity, effectively opt-out of the group. Applying those factors, classifications based on sexual orientation clearly warrant heightened scrutiny.

1. It is beyond question that gay men and lesbians have suffered a history of purposeful discrimination, both private and legal. They have been ostracized, humiliated, prosecuted, denied both private and government employment, and denied even the right to form a family. Few groups in American history have experienced such persistent and pervasive discrimination.

2. A person's sexual orientation is irrelevant to her ability to contribute to society. Sexual orientation is not in any way a disability that renders an individual less capable of being a lawyer, doctor, policeman, parent, teacher, plumber, or judge. It is a classic example of a personal characteristic that has no legitimate bearing on one's competence, skill, or value as a human being.

3. Gay and lesbian individuals have limited ability to protect themselves through the political process against continued public and private discrimination.

As an initial matter, this Court's decisions do not support BLAG's suggestion that relative political power is a particularly weighty factor in the analysis. In any event, the limited political power of gay and lesbian persons weighs in favor of applying heightened scrutiny here. Although there have been some recent successes in a few jurisdictions in the struggle for equal rights for gay and lesbian individuals, attempts to secure federal and state antidiscrimination legislation often have failed, and many recent strides toward equality have been swiftly rolled back by aggressive ballot initiatives. The barriers to gay and lesbian persons achieving equal respect, equal dignity, and equal rights through the political process remain daunting, and private discrimination and hostility are still often both widespread and fierce.

Against the backdrop of the nation's history of discrimination against gay and lesbian persons, this Court's decisions teach that the limited and recent progress achieved by this group does not in any way preclude heightened scrutiny of laws that discriminate on the basis of sexual orientation. In *Loving v. Virginia*, this Court unanimously applied strict scrutiny to a law that prohibited interracial marriage, after observing that fourteen states had repealed their anti-miscegenation statutes in the fifteen years leading up to that decision. 388 U.S. 1, 6 n.6 (1967). The Court also extended heightened scrutiny to sex-based classifications at a time when Congress had recently enacted several statutory prohibitions on sex-based discrimination, including the Equal Rights Amendment of 1972. In the same vein, a few scattered victories in a handful of states do not preclude heightened scrutiny

for laws that discriminate against gay and lesbian individuals today.

4. Gay and lesbian individuals share a common "immutable" characteristic, both because sexual orientation is fundamental to their identity, *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003), and because one's sexual orientation is not changeable "through conscious decision, therapeutic intervention or any other method." Pet. App. 231a.

Finally, there is no *stare decisis* impediment to applying heightened scrutiny to laws that discriminate against gay and lesbian individuals. Neither the summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), nor the Court's more recent decisions, addressed the appropriate level of scrutiny to apply to laws that discriminate against gay and lesbian persons.

Accordingly, this Court should apply the traditional four-factor test and hold that heightened scrutiny applies to laws that discriminate on the basis of sexual orientation.

ARGUMENT

THE CONSTITUTION REQUIRES HEIGHTENED JUDICIAL SCRUTINY OF LAWS THAT DISCRIMINATE AGAINST GAY AND LESBIAN PERSONS

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[2] U.S. Const. amend. XIV, § 1.

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[2] The equal-protection component of the Fifth Amendment is identical to and coextensive with the Fourteenth Amendment's guarantee. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal

Laws that distinguish among individuals in the distribution of benefits or burdens generally are presumed to be valid, and will be sustained, if they are "rationally related to a legitimate [government] interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). But that "general rule gives way" when the law in question classifies based on factors that "reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id.* "Legislation predicated on such prejudice is . . . incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Accordingly, this Court has held that any law that classifies on the basis of such a characteristic must be tested by heightened judicial scrutiny in order to pass constitutional muster. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Clark v. Jeter*, 486 U.S. 456 (1988) (legitimacy); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (sex/gender).[3]

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protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

[3] A law that singles out such a class for disparate treatment must be narrowly tailored to serve a compelling government interest. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). Laws that discriminate on the basis of sex are considered quasi-suspect and must be "substantially related to an

In determining whether heightened scrutiny is appropriate, the Court generally considers four factors: (1) whether the group has experienced a history of invidious discrimination, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam); (2) whether the discrimination is based on "'stereotyped characteristics not truly indicative'" of the group's abilities, *Cleburne*, 473 U.S. at 441 (quoting *Murgia*, 427 U.S. at 313); (3) whether members of the group have "'obvious, immutable, or distinguishing characteristics that define them as a discrete group,'" *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (citation omitted); and (4) whether the group lacks the capacity adequately to protect itself in the political process, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

The Court has not insisted that all four factors be present in every instance. For example, in some cases the Court has applied heightened scrutiny despite a group's substantial political power or the ability of individuals to opt out of the class. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (holding that all racial classifications are inherently suspect, even though many racial groups exercise substantial political power); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (resident aliens are a suspect class notwithstanding their ability to opt out of the class).[4]

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important governmental objective." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 721-22 (1982).

[4] *See also 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: A Theory of Judicial Review* 150 (1980)); *id.* at 472 n.24 (Marshall, J., concurring in judgment in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the

In general, however, these are the four factors the Court considers in deciding whether heightened scrutiny is appropriate.

Consideration of these four factors clearly establishes that laws that discriminate against gay men and lesbians must be subjected to heightened judicial scrutiny. Gay men and lesbians have long suffered a history of discrimination across all facets of life; sexual orientation has no bearing on an individual's ability to contribute to society; gay and lesbian individuals have historically faced significant obstacles to protecting themselves from discrimination through the democratic process; and sexual orientation is immutable or, at a minimum, is a defining characteristic that an individual ought not be compelled by law to change in order to avoid discrimination.

A. Gay Men And Lesbians Have Faced A Long History Of Discrimination

There can be no doubt that homosexuals historically have been, and continue to be, the target of purposeful and often grievously harmful discrimination because of their sexual orientation. For centuries, the prevailing attitude toward gay persons has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Richard A. Posner, *Sex and Reason* 291 (1992); *see also* Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal*

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gender cases demonstrate, nor sufficient, as the example of minors illustrates." (citation omitted)); *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (applying intermediate scrutiny to women while finding that they "do not constitute a small and powerless minority").

Protection 62 (1999) (cataloguing the "numerous legal disadvantages" suffered by gay men and lesbians "in twentieth-century America"). Gay men and lesbians have been denied employment, targeted for violence, publicly humiliated, and treated as perverts, sinners, and criminals.[5]

The long history of discrimination against gay men and lesbians in this country has been recounted at length by numerous historians, courts, other amici, and by the United States itself. *See, e.g.*, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 314-15 (D. Conn. 2012); *Golinski v. United States Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-86 (N.D. Cal.), *petition for cert. filed* (U.S. July 3, 2012) (No. 12-16); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981-91 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012); *see also* Amicus Br. of Organization of American Historians et al. It therefore suffices for present purposes to provide only a few of many possible examples of the historical discrimination against this group in almost every facet of American life.

One need only look to the federal government's own practices for examples of the widespread, government-sanctioned discrimination suffered by gay and lesbian persons. *See* Br. for the United States at 16, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335, 12-2435), 2012 WL 3548007 ("The federal government has played a significant and regrettable

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[5] *See also Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (stating that "homosexuals have historically been the object of pernicious and sustained hostility").

role in the history of discrimination against gay and lesbian individuals.").

During World War II, for example, the military systematically attempted to screen out lesbians and gay men from the armed forces and—adding insult to injury—denied benefits to those who had served their nation. Nathaniel Frank, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America* 9-11 (2009). During the 1950s, President Eisenhower issued an executive order requiring the discharge of homosexual employees from all federal employment and mandating that all defense contractors and other private corporations with federal contracts ferret out and fire all homosexual employees.[6] The federal government's employment discrimination against gay men and lesbians continued until the late 1990s. *See* Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (June 2, 1998). As recently as 1993, the federal government enacted the "Don't Ask, Don't Tell" policy, which forced service members to choose between concealing their sexual orientation and being discharged from the service. That policy remained in effect until late 2010. 10 U.S.C. § 654(b) (2006), *repealed by* Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (2010).

In the realm of immigration, from 1917 to 1990 Congress prohibited gay men and women from

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[6] "At the height of the McCarthy witch-hunt, the [Department of State] fired more homosexuals than communists. In the 1950s and 1960s literally thousands of men and women were discharged or forced to resign from civilian positions in the federal government because they were suspected of being gay or lesbian." George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* 6 (2004).

entering the country. *See* Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (1917) (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 who acknowledged their homosexuality from entering this country); Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990) (finally eliminating "sexual deviants" from the list of excludable aliens).[7]

Gay and lesbian individuals have also faced legal discrimination in the domestic sphere. For example, state laws historically prohibited (and some still prohibit) gay men and lesbians (and same-sex couples) from serving as foster or adoptive parents. *See*, *e.g.*, Fla. Stat. § 63.042(3) (2003) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."); Miss. Code Ann. § 93-17-3(2) (2000) (prohibiting "[a]doption by couples of the same gender"); Utah Code Ann. § 78-30-1(3)(b) (2006) (prohibiting "a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of [Utah]" from adopting through a public state agency); *see also Opinion of the Justices*, 525 A.2d 1095, 1098-1100 (N.H. 1987) (finding

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[7] *See also Boutilier v. INS*, 387 U.S. 118 (1967); Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What is in the Future for Homosexual Aliens?*, 7 Yale L. & Pol'y Rev. 201, 208-15 (1989) (surveying the historical treatment of homosexuals under United States immigration laws).

that legislature's proposal excluding homosexuals from foster care and adoption did not violate the equal protection clause of either the U.S. Constitution or the New Hampshire constitution); *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *10-12 (Ark. Cir. Dec. 29, 2004) (upholding law that forbids the placement of children in the foster care of homosexuals), *aff'd*, 238 S.W.3d 1 (Ark. 2006).

Perhaps the most telling evidence of the animus and discrimination against gay men and lesbians is the legacy of widespread criminalization of sexual conduct between consenting adults of the same sex. *See Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *see also Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) ("[T]he strong objection to homosexual conduct . . . has prevailed in Western culture for the past seven centuries."), *cert. denied*, 478 U.S. 1022 (1986). Such laws, this Court has recognized, unlawfully "demean [the] existence" of gay and lesbian individuals. *Lawrence*, 539 U.S. at 578.

In a society in which homosexuality was excoriated as a heinous sin, the law branded it a serious crime, and the medical profession treated gay persons as diseased freaks of nature, individuals who suspected themselves of harboring homosexual desires were made to feel inferior and reviled. Gay men and lesbians attempted, often desperately, to hide their secret shame from family, friends, neighbors, and associates. The fear of discovery kept the secret lives of most gay men and lesbians invisible, even to one another. In short, gay men and lesbians have endured significant and longstanding discrimination in this country. Every

court to have considered that question has come to the same conclusion.[8]

B. Sexual Orientation Is Irrelevant To An Individual's Ability To "Contribute To Society"

Another critical factor in the Court's heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that "'frequently bears [a] relation to ability to perform or contribute to society.'" *Cleburne*, 473 U.S. at 440-41 (citation omitted); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (plurality op.) ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

In *Cleburne*, the Court ruled that heightened scrutiny was inappropriate for laws discriminating against people who are "mentally retarded," because such individuals "have a reduced ability to cope with and function in the everyday world." 473 U.S. at 442. The Court similarly held that heightened scrutiny was not appropriate in reviewing mandatory retirement laws because "ability generally declines with age."

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[8] That gay men and lesbians were not historically "disenfranchised" (BLAG Br. at 57) does not diminish this undeniable history of discrimination; the Court has never required a history of disenfranchisement to trigger heightened scrutiny. *See, e.g.*, *Lalli v. Lalli*, 439 U.S. 259, 264-66 (1978) (recognizing illegitimacy as a quasi-suspect class entitled to intermediate scrutiny even though citizens born out of wedlock have never been disenfranchised).

Murgia, 427 U.S. at 315; *see also Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) ("It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age.").

As numerous courts, scholars, the American Psychiatric Association—and even the Proponents of Proposition 8—have recognized, homosexual orientation "'implies no impairment in judgment, stability, reliability or general social or vocational capabilities.'" *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (quoting Resolution of the American Psychological Association (1975)), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 508 U.S. 952 (1993); *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("Sexual orientation plainly has no relevance to a person's 'ability to perform or contribute to society.'" (citation omitted)), *cert. denied*, 498 U.S. 957 (1990); Laurence H. Tribe, *American Constitutional Law* § 16-33 (2d ed. 1988) ("[H]omosexuality bears no relation at all to [an] individual's ability to contribute fully to society."); Am. Psychiatric Ass'n, *Position Statement On Homosexuality and Civil Rights*, 131 Am. J. Psychiatry 436, 497 (1974); *Perry* J.A. Exh. 121.[9]

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[9] *See also Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994) ("[S]exual orientation … bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society . . . ."), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996); *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007) ("[G]ay . . . persons . . . have been subject to unique disabilities not truly indicative of their abilities to contribute meaningfully to society."); *Hernandez v. Robles*, 855 N.E. 2d 1, 28 (N.Y. 2006) (Kaye, C.J., dissenting) ("Obviously,

Indeed, gay men and lesbians can and do perform perfectly well as contributing members of society as lawyers, doctors, plumbers, soldiers, athletes, professors, judges, and parents—when they are permitted to do so. Thus, this Court's observation that race, gender, alienage, and national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," is equally applicable to gay men and women. *Cleburne*, 473 U.S. at 440.

Rather than dispute any of this, Proponents and BLAG change the subject. Twisting the Court's doctrine, they suggest that the critical inquiry is not whether sexual orientation frequently bears on "a person's ability to participate in or contribute to society," *Cleburne*, 473 U.S. at 440-41 (citation omitted), but "whether the group has 'distinguishing characteristics' relevant to the distinctions *actually drawn*" by the law at issue, BLAG Br. at 54 (emphasis added); *see also* Proponents Br. at 29 n.1 ("[T]his distinction reflects biological realities closely related to society's traditional interest in marriage."). Proceeding from this mistaken premise, they argue that "the relevant distinguishing characteristic of same-sex couples" is that they enter into "relationships that do not produce unplanned and unintended offspring." BLAG Br. at 54.

This reformulation of the Court's doctrine stands the heightened scrutiny principle on its head. Under this Court's equal protection doctrine, the applicable

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sexual orientation is irrelevant to one's ability to perform or contribute.").

level of scrutiny must be determined at the threshold, antecedent to and independent of whether any particular law that discriminates against the group might be deemed "reasonable." *See, e.g.*, *Cleburne*, 473 U.S. at 442-43, 447. This is fundamental to the very concept of heightened scrutiny under the Equal Protection Clause. As the court of appeals explained, whether the classification is related to the "distinctions actually drawn" in the law in question "bear[s] upon whether the law withstands scrutiny (the second step of analysis)," not on the question of what level of scrutiny is appropriate. United States *Windsor* Supp. App. 18a. Neither BLAG nor Proponents disputes that sexual orientation—like sex and other "recognized suspect criteria"—"bears no relation to [one's] ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686 (plurality op.).[10]

C. Gay Men And Lesbians Lack Sufficient Political Power To Protect Themselves Against Invidious Discrimination

That gay and lesbian individuals as a group possess limited ability to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate against such individuals.

1. Before turning to the substantial body of evidence establishing the political vulnerability of gay men and lesbians, it is useful first to examine the nature and extent of this Court's consideration of political power in the heightened scrutiny analysis. As

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[10] It is also bizarre to suggest that a group otherwise entitled to heightened scrutiny protection ought to be denied that status because its members are *less* likely to engage in irresponsible procreation.

this Court has repeatedly made clear, the fact that a group has *some* political influence does not in any way foreclose—or even weigh significantly against—the need for heightened scrutiny. To the contrary, the Court has in some cases invoked, and continues to invoke, heightened scrutiny to test the constitutionality of laws that discriminate against groups that possess significant political influence.[11]

African-Americans, for example, had made significant gains in political influence at the time of many of the Court's most important decisions applying strict scrutiny to racial classifications. In *Loving v. Virginia*, 388 U.S. 1, 6 n.6 (1967), for example, the Court observed that fourteen states had repealed their

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[11] While we recognize that the attainment of high political office by someone belonging to a particular group may have little if any correlation with the degree to which the group *qua* group enjoys political power, it is worth noting that racial minorities have served as President of the United States, Attorney General, Secretary of State, and held numerous other state and federal positions. The 113th Congress contains 44 African Americans, 38 Hispanic Americans, 12 Asian Americans, and 3 American Indians. *See* House Press Gallery, *Demographics*, http://housepressgallery.house.gov/member-data/demographics (last visited Feb. 27, 2013); United States Senate, *Ethnic Diversity in the Senate*, http://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm (last visited Feb. 27, 2013).

Women have served as Secretary of State, Attorney General, Speaker of the House, Secretary of Health and Human Services, and Secretary of Homeland Security, and have held numerous additional powerful state and federal positions. The 113th Congress contains 100 women, including 20 senators. *See* House Press Gallery, *supra*; United States Senate, *Women in the Senate*, http://www.senate.gov/artandhistory/history/common/briefing/women_senators.htm (last visited Feb. 27, 2013).

anti-miscegenation statutes in the fifteen years leading up to that decision. The Court nevertheless unanimously applied strict scrutiny to a law that discriminated against African-Americans.

Women, too, had achieved substantial political successes by the time heightened scrutiny was first applied to sex-based classifications. The *Frontiero* plurality observed, for example, that "the position of women in America ha[d] improved markedly in recent decades." 411 U.S. at 685. Congress had recently enacted several statutory prohibitions on sex-based discrimination (including Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963), and both houses of Congress had garnered the supermajorities necessary to pass the Equal Rights Amendment. *Id.* at 687. The plurality nonetheless correctly concluded that heightened scrutiny should apply to laws that discriminate on the basis of sex, in view of the "long and unfortunate history of sex discrimination." *Id.* at 684.[12]

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[12] Moreover, the Court has applied heightened scrutiny even to classes that have historically been among the most politically powerful in the nation. *See Craig v. Boren*, 429 U.S. 190, 208-10 (1976) (men); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (whites); *Adarand*, 515 U.S. at 227-31 (same). The Court in these cases was fully aware of the substantial political power held by the groups that these cases protect. *See Craig*, 429 U.S. at 219 (Rehnquist, J., dissenting) ("There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts."); *Croson*, 488 U.S. at 495 ("*Even were we to* accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened

2. In any event, there is little doubt that the consideration of limited political power weighs heavily in favor of heightened scrutiny of laws that discriminate against gay men and lesbians.

Indeed, gay men and lesbians have often failed in attempts to secure federal or state legislation to limit discrimination against them. Women and racial minorities, by contrast, have long enjoyed such protections. For example, to this day twenty-nine states have no laws prohibiting discrimination against gays and lesbians in employment, housing, or public accommodations, notwithstanding the history of discrimination discussed above. *Perry* J.A. 742-43 (Segura); *see also* Letter from United States Government Accountability Office to Hon. Tom Harkin et al., *Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data* (Oct. 1, 2009), *available at* http://www.gao.gov/new.items/d10135r.pdf. Many states still forbid same-sex couples from adopting children, *Pedersen*, 881 F. Supp. 2d at 327-28, and still more prohibit same-sex couples from marrying. In the last two decades, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic antidiscrimination protections for gay and lesbian individuals have failed. *See Perry* J.A. 741, 750.[13]

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scrutiny would still be appropriate in the circumstances of this case." (emphasis added)).

[13] *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363, 1393 (2011) ("It hardly follows that a group is politically 'powerful' because it has achieved some success in securing legal

Moreover, in some instances hard-fought gains in the battle for equal rights for gay men and lesbians have been rolled back by aggressive ballot initiatives. Indeed, voters have used initiatives or referenda to repeal or prohibit equal marriage rights for same-sex couples on thirty-three occasions in recent years. In short, "[t]here is no group in American society who has been targeted by ballot initiatives more than gays and lesbians." *Perry* J.A. 750 (Segura).

The prevalence of violence directed at gay and lesbian individuals is also a strong indicator of relative powerlessness. Anti-gay hate crimes increased dramatically between 2003 and 2008, and hate crimes targeting lesbian and gay individuals represent an increasingly large share of total hate crimes in the United States. *Perry* J.A. 471 (Segura). The threat of private discrimination and violence further undermines the ability of many gay and lesbian people to participate fully in the political process by encouraging them to stay "in the closet." Although recent increased acceptance in some (mostly urban) areas of the country has encouraged more gay and lesbian individuals to live openly, many remain personally and politically "invisible."[14]

Gay and lesbian individuals also remain "vastly under-represented in this Nation's decisionmaking councils." *Frontiero*, 411 U.S. at 686 n.17. There are only seven openly gay individuals currently serving in

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remedies against some of the formal and informal discrimination that has long burdened the group.").

14 *See* Schacter, *supra*, at 1385-86 (describing Professor Segura's testimony in *Perry v. Schwarzenegger*).

Congress.[15] The Connecticut Supreme Court observed in 2008 that, of the more than half million people who then held political office at the local, state, and national levels in this country, only about 300 were openly gay. *See Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407, 446 (Conn. 2008).[16] No openly gay person has ever served in the United States Cabinet, or on any federal court of appeals. This stands in marked contrast to the relative successes of members of other groups who have been accorded the protection of heightened scrutiny under the Equal Protection Clause. Indeed, in light of the very small number of openly gay public officials in the United States today, it is reasonable to conclude that lesbians and gay men have only one-fiftieth the representation they would have in the halls of government if it were not for the past and present discrimination against them.[17]

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[15] David R. Sands, *113th Congress Mirrors Increasingly Diverse U.S.*, Wash. Times, Jan. 7, 2013, *available at* http://www.washingtontimes.com/news/2013/jan/7/113th-congress-mirrors-increasingly-diverse-us/#ixzz2KHEmHzJj.

[16] The ability to hide one's sexual orientation is a hindrance rather than an aid in securing rights. As Justice Brennan (joined by Justice Marshall) put it: "homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting).

[17] Although the exact number of gay men and lesbians in the U.S. is unknown, a 2012 Gallup poll reported that 3.4% of Americans self-identify as lesbian, gay, bisexual, or transgender. Gary Gates & Frank Newport, Gallup Politics, *Special Report: 3.4% of U.S. Adults Identify as LGBT* (Oct. 18,

BLAG notes (at 51-53) that President Obama supports equal rights for gay and lesbian individuals. But the support of the president—who cannot himself change discriminatory federal or state laws—has never been considered by this Court as disqualifying from heightened scrutiny a group that has suffered a long history of discrimination. Although Presidents Nixon and Ford both supported the Equal Rights Amendment, the Court did not decline to extend heightened scrutiny to laws that discriminated against women in the 1970s. Similarly, although President Truman desegregated the military[18] and President Eisenhower supported the Civil Rights Act of 1957,[19] the Court did not hesitate to extend heightened scrutiny to laws that discriminated against African-Americans in the 1940s and 1950s.

BLAG's attempt to characterize the growing support for equal rights for gay and lesbian individuals in some jurisdictions as sufficient to justify rejecting heightened scrutiny here is wholly misguided. While there have been some recent successes in securing antidiscrimination legislation (and even marriage equality) in some parts of the nation, those very recent and patchwork results do not alter the conclusion that gay men and lesbians lack sufficient political clout to effectively protect themselves in the political process more generally. A modicum of political success in

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2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx. But only .06% of public officials are openly gay. *Kerrigan*, 957 A.2d at 446.

[18] *See* Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948).

[19] *See* Statement by the President on the Objectives of the Civil Rights Bill, 1957 Pub. Papers 545 (July 16, 1957) (urging passage of the proposed legislation).

select jurisdictions is insufficient to establish that a historically oppressed and subordinated group can adequately protect itself in the political process more generally. *See Loving*, 388 U.S. at 6; *see generally* Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 742 (1985) (arguing that the Court's focus should be on "systematic disadvantages that undermine our system's legitimacy"); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 145-70 (1980) (discussing how deep-seated prejudice can distort the political process).

The plain and simple fact is that the barriers to achieving equal respect, equal dignity, and equal rights through the political process remain daunting. This is especially evident at the state level, where a substantial majority of jurisdictions still fervently opposes equal rights for gay men and lesbians and where private discrimination is still often both widespread and fierce. Just as the repeal of anti-miscegenation laws in some states was insufficient to prevent the Court in *Loving* from employing heightened scrutiny to invalidate such laws in 1967, and just as laws prohibiting discrimination against women were insufficient to prevent the Court from employing heightened scrutiny to invalidate laws discriminating against women since the 1970s, so too are scattered victories in a handful of states an insufficient basis on which to reject heightened scrutiny for laws that discriminate against gay and lesbian individuals today.

D. Sexual Orientation Is An "Immutable" Or "Defining" Characteristic

In deciding whether heightened scrutiny is appropriate under the Equal Protection Clause, the Court has looked with particular suspicion upon laws

that discriminate on the basis of "'immutable … or distinguishing characteristics that define [persons] as a discrete group.'" *Gilliard*, 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). This consideration derives from the "basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 626; *cf. Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.) (characteristic is "'immutable'" when "'the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences'" (citation omitted)).

Accordingly, a law is more likely to receive heightened scrutiny if it discriminates against an individual based on a characteristic that she either cannot realistically change, or ought not be compelled to change because it is fundamental to her identity. *See, e.g.*, *Plyler*, 457 U.S. at 220 (noting that illegal alien children "have little control" over that status); *Nyquist*, 432 U.S. at 9 n.11 (treating resident aliens as a suspect class despite their ability to opt out of that class); *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (noting that a "[c]lassification[] based on … religion, of course, would trigger strict scrutiny"); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (rational basis review applies "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage").[20]

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[20] This Court has on several occasions applied heightened scrutiny to laws that discriminate against a group whose defining characteristics are capable of alteration. These characteristics, moreover, need not manifest in the form of an "obvious badge"; they often may be disclosed or suppressed as a matter of

Sexual orientation clearly falls within this category of defining personal characteristics. As this Court has acknowledged, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if, as Proponents suppose, such a choice could be made. *See Lawrence*, 539 U.S. at 576-77 (recognizing that individual decisions by consenting adults concerning the intimacies of their physical relationships are "an integral part of human freedom").[21]

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preference. *See Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976); *see also Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in judgment) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. . . . At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.").

[21] *See also, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("Because a person'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."); *Kerrigan*, 957 A.2d at 438 ("In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution."); *Golinski*, 824 F. Supp. 2d at

In any event, as the district court found in *Perry* on a full trial record, there is now broad medical and scientific consensus that sexual orientation *is* an immutable characteristic, in the very sense that Proponents would require. *See Perry* Pet. App. 231a ("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."); *see also* Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults* 7 Sex Res. Soc. Policy 176 (2010).[22]

Proponents' and BLAG's contrary arguments rest principally on a supposed distinction between "status"—a characteristic that defines a class—and "the propensity to engage in a certain kind of conduct." The Court has emphatically and correctly rejected attempts to draw a distinction between "status and

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987 ("[A] person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it.").

[22] Proponents argued below, and BLAG argues in this Court (at 55), that homosexuality is not "immutable" because some individuals claim to have experienced a change in their sexual orientation over the course of their lives. To the extent that such individuals report experiencing a passive change that was not in their control, that obviously is not relevant to the immutability inquiry, which is focused on whether an individual is "responsibl[e]" for the characteristic at issue. *Frontiero*, 411 U.S. at 626. But even if some small number of individuals report the ability to voluntarily "change," heightened scrutiny is still appropriate here, for at least two reasons. First, such claims are both rare and of questionable validity, as there is now broad medical and scientific consensus that one's sexual orientation (as distinct from one's sexual conduct) is largely unchangeable. Second, other characteristics that trigger heightened scrutiny (such as gender) can also, with great difficulty, be altered.

conduct" in defining the rights of "homosexual persons." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("*CLS*") ("Our decisions have declined to distinguish between status and conduct in this context."); *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." (emphasis added)); *see also id.* at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."); *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, [the] law is targeted at more than conduct. It is instead directed toward gay persons *as a class*." (emphasis added)). The lower court decisions on which Proponents and BLAG rely (most of which were decided before *Lawrence* overruled *Bowers*) are also grounded on the now-discredited theory that homosexual *behavior* is changeable and therefore homosexuality is not immutable. Those decisions do not survive *Lawrence* and *CLS*.[23]

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[23] *E.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (sexual orientation is "not an immutable characteristic" because "[h]omosexuality ... is behavioral."). Somewhat ironically, other lower court decisions applying rational basis review *did* recognize the status/conduct problem; they relied on *Bowers* and reasoned that it would be "anomalous ... to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *see infra* at 28-29 & nn. 26-28.

E. Neither *Baker v. Nelson* Nor *Romer v. Evans* Nor *Lawrence* Forecloses Application Of Heightened Scrutiny

This case presents an issue of first impression. Though members of the Court have opined on the issue,[24] neither *Baker v. Nelson*, 409 U.S. 810 (1972) nor the Court's more recent decisions squarely addressed—much less resolved—the appropriate level of scrutiny to apply to laws that discriminate against gay and lesbian persons.

In *Baker*, a summary dismissal of an appeal from a state court decision holding that gay men do not have a federal constitutional right to marry, the appellants did not even make this argument, so it was not before the Court. *See* Appellant's Jurisdictional Statement 3, *Baker v. Nelson*, No. 71-1027 (S. Ct. filed Feb. 11, 1972) ("Questions Presented"); *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (summary disposition does not decide questions that "'merely lurk[ed] in the record'" (citation omitted)).

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[24] *See, e.g.*, *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment) (finding a Texas law banning same-sex sodomy to "exhibit[] ... a desire to harm" homosexuals as "a politically unpopular group," thus warranting "a more searching form of rational basis review ... under the Equal Protection Clause"); *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of certiorari) (describing homosexuals as "a significant," politically "powerless," "historically" scorned, and "insular minority," and observing that "[s]tate action taken against members of such groups based simply on their status as members of the group traditionally has been subject to strict, or at least heightened, scrutiny by this Court").

In any event, both the Court's interpretation of the Equal Protection Clause and legal, medical, cultural, and social attitudes towards sexual orientation have changed so profoundly since 1972 that the summary dismissal in *Baker* has little if any precedential effect today. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (a summary dismissal is not binding if it has been undermined by subsequent "doctrinal developments"). Among other significant developments since *Baker*, the State may no longer "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578 (overruling *Bowers v. Hardwick*).[25]

The Court's more recent decisions in *Romer v. Evans* and *Lawrence* clearly do not foreclose the

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[25] In the forty years since *Baker* was decided, this Court has transformed both its equal protection jurisprudence generally, and its treatment of sexual orientation in particular. It is now well settled that discrimination on the basis of sex triggers heightened scrutiny. *Compare Baker*, Jurisdictional Statement 16 ("It is true that the inherently suspect test which this Court applied to classifications based upon race has not yet been extended to classifications based upon sex." (internal citations omitted)), *with Frontiero*, 411 U.S. at 688 (plurality) (concluding that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect" and therefore subject to heightened scrutiny); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (party who seeks to defend a statute that classifies individuals on the basis of sex "must carry the burden of showing an 'exceedingly persuasive justification' for the classification" (citation omitted)). The Court now acknowledges that sexual orientation is a self-identifying trait, and has held that the "classification of [homosexuals] undertaken for its own sake" must be struck down as lacking any legitimate basis. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

application of heightened scrutiny. Although the plaintiff-respondents in *Romer* argued for heightened scrutiny in the trial court, they did not make that argument in this Court. *See* 517 U.S. 620, 640 n.1 (1996) (Scalia, J., dissenting). Moreover, the Court's analysis in *Romer* hinged ultimately not on the identity of the affected class, but on the inadequate justification for the challenged law: "Moral disapproval of [a] group." *Lawrence*, 539 U.S. at 582 (citing *Romer*, 517 U.S. at 634-35). Because the law challenged in *Romer* failed even the most deferential measure of equal protection scrutiny, the Court found it unnecessary to consider the broader question.

Similarly, although *Lawrence* expanded the substantive protections afforded to homosexuals, it too did not address the standard of review applicable to laws that discriminate against gay men and lesbians under the Equal Protection Clause. Instead, the Court in *Lawrence* resolved the issue before it by holding that the challenged law violated "the Due Process Clause of the Fourteenth Amendment." 539 U.S. at 564, 578-79. The Court therefore found it unnecessary to address the equal protection issue. *See id.* at 574-75 (noting that the equal protection argument is "tenable" but "conclud[ing] the instant case requires [the Court] to address whether *Bowers* itself has continuing validity").

BLAG emphasizes (at 13 & n.4, 28-29) the lower court decisions that have applied rational basis review to laws that discriminate on the basis of sexual orientation. Those decisions are unpersuasive. With the exception of the Second Circuit in *Windsor*, no federal court of appeals has analyzed the issue according to the Court's four-factor test since *Bowers*

was overruled. Most of the decisions rely explicitly on *Bowers*—or on other circuit decisions that relied on *Bowers*.[26] And the post-*Lawrence* decisions (save *Windsor*, which held that heightened scrutiny was appropriate) expressly refrained from considering the factors,[27] or hewed to pre-*Lawrence* binding circuit precedent, awaiting further guidance from this Court.[28]

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[26] *See, e.g.*, *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."), *cert. denied*, 494 U.S. 1003 (1990)); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class . . . ."), *cert. denied*, 494 U.S. 2004 (1990); *Equality Found. of Greater Cincinnati*, 54 F.3d at 266-67 & n.2 ("Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected."); *Padula*, 822 F.2d at 103 ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.").

[27] *Cook v. Gates*, 528 F.3d 42, 51 (1st Cir. 2008); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) ("Moreover, all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class." (citing, *inter alia*, *High Tech Gays*, 895 F.2d at 571 ("[B]ecause homosexual conduct can . . . be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class.")).

[28] *See, e.g.*, *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) (citing *Equality Found. of Greater Cincinnati*, 128 F.3d at 292-94); *Perry v. Brown*, 671 F.3d 1052, 1080 n.13 (9th Cir. 2012) (citing *High Tech Gays*, 895 F.2d at 574); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008)

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"[T]he judiciary's role under the Equal Protection Clause is to protect 'discrete and insular minorities' from majoritarian prejudice or indifference." *Croson*, 488 U.S. at 495 (citation omitted). It is not seriously disputed that gay men and lesbians have experienced a history of purposeful discrimination on the basis of a characteristic that bears no relation to their ability to contribute to society. Gay men and lesbians also lack sufficient political power to protect themselves against continued discrimination. And sexual orientation is both fundamental to one's identity, *Lawrence*, 539 U.S. 576-77, and not changeable "through conscious decision, therapeutic intervention or any other method." *Perry* Pet. App. 231a. Laws that discriminate against gay and lesbian persons should therefore be tested by heightened judicial scrutiny.

(citing *Walmer v. Dep't of Defense*, 52 F.3d 851, 854 (10th Cir. 1995)).

CONCLUSION

For the foregoing reasons, this Court should hold that laws that classify individuals for disparate treatment on the basis of their sexual orientation trigger heightened scrutiny.

Respectfully submitted,

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